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L. L.

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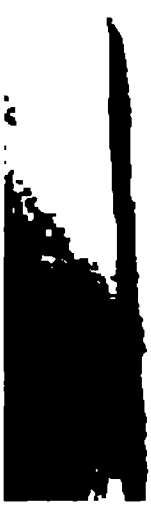
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery,

FROM THE YEAR 1789 to 1817.

29 to 57 GEO. III.

By FRANCIS VESEY, JUNIOR, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

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1827.

Lord ELDON,

Lord Chancellor.

Sir WILLIAM GRANT, Knt.

Master of the Rolls.

The Honourable SPENCER PERCEVAL, Attorney General.

Sir THOMAS MANNERS SUTTON,

Sir VICARY GIBBS,

} Solicitor General.



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IN

CHANCERY, &c.

THE SITTINGS
AFTER TRINITY TERM,
44 GEO. III. 1804.

GARTHSHORE v. CHALIE.

1804.
June 15th,
19th.
July 4th, 5th,
9th.

BY indentures, previous to the marriage of *John Chalie* and *Susanna Clarmont*, dated the 11th of *May*, 1763, *John Chalie* covenanted, in consideration of the marriage, and a portion of 5000*l.*, and for making some provision for her, in case she should happen to survive him, and for the issue of the marriage, that, if he should happen to die before the said *Susanna*, without leaving any child or children of the marriage living at the time of his decease, and without leaving her *ensient* of any child or children, which should be afterwards born alive, then, and in such case, his heirs, executors, &c. should within six months after his decease, convey, pay, assign, transfer, or deliver over, unto and for the proper use and benefit of *Susanna Clarmont*, her heirs, executors, &c. full five-eighth parts of such real and personal estate, as he or any person in trust for him should

Covenant in marriage settlement by the husband in the event of his death, leaving his wife surviving and children, within six months after his decease to convey, pay, assign, &c. one full and clear moiety of all such real and personal estate as he shall be seised and

possessed of, or entitled to, at his decease.

Upon the principle of part-performance the widow not entitled in addition to the moiety under the covenant to a third of the residue of the personal estate by the intestacy of her husband.

The personal estate, upon which the covenant attaches, is the residue, subject to the debts.

1804.
 ~~~~~  
 GARTHSHORE  
 v.  
 CHALIE.

should be seised, possessed of, or entitled to, at his decease; and if it should happen, that he should die before *Susanna Clarmont*, leaving any child or children of the marriage living at his decease, or leaving her *ensient* of one or more child or children, which should afterwards be born alive, then and in such case the heirs, executors, &c. of *Chalie* shall and will within six months next after his decease, convey, pay, assign, &c. unto and for the proper use and benefit of *Susanna Clarmont*, her heirs, executors, &c. one full and clear moiety, or half part, of all such real and personal estate, as he or any person in trust for him shall be seised, possessed of, or entitled to, at such the time of his decease. The mother of Mr. *Chalie* also covenanted, in consideration of natural love and affection for her son, by Will or Deed, to give, bequeath, or secure, 2500*l.* at least to him, his executors, &c.

The marriage took place. Mr. *Chalie* died in August 1803, intestate; leaving his widow *Susanna*, his daughter *Jane Garthshore*, and his grandson *Henry Skrene*, the son of another daughter, deceased, his only next of kin, surviving him. His widow obtained administration. *Jane Garthshore* died soon after her father; and her husband, having taken administration to her, filed the bill against Mrs. *Chalie* and *Henry Skrene*, the infant; charging, that the former was entitled only to one moiety of the personal estate, and not to one third of the remainder thereof under the Statute of Distributions (1), and praying an account, &c. The Defendant, the widow, insisted upon her claims under the settlement, and also to one-third of the residue under the Statute.

Mr.

(1) Stat. 22 & 23 Ch. II. c. 10.



Mr. Romilly and Mr. Bell, for the Plaintiff:

1804.

Mr. Lloyd and Mr. Whishaw, for Defendants,  
in the same interest.

GARTHSHORE

v.

CHALIE.

The object of Mr. *Chalie* by the covenant in his marriage settlement clearly was, not to constitute a debt to his wife in the first place, but to make a complete provision for her; thereby purchasing for his children a clear moiety of his real and personal estates at the time of his death. This is, not a specific lien, but a general engagement, affecting all his property at his death; intended only to secure her against any disposition by Will; according to *Randall v. Willis* (2), and *Jones v. Martin* (3). In *Lewis v. Maddocks* (4) those cases were very much considered by your Lordship. The conclusion is, that any fair application is good; and nothing passes but the residue, after all the engagements of the property, which is the subject of the covenant, are satisfied. The Court leans strongly against a double performance of a duty; and accordingly it has been decided, that, where a man, having covenanted to leave a certain sum to his wife, has died intestate, and she has taken under the Statute of Distributions a sum equal or greater, that is a satisfaction or performance: *Blandy v. Widmore* (5); *Lee v. D'Aranda* (6); *Barret v. Beckford* (7); where Lord *Hardwicke* considers it an actual performance; distinguishing between performance and satisfaction. The same principle appears in *Lechmere v. The Earl of Carlisle* (8), and

(2) Ante, Vol. V, 262; see the note, 276.

See upon satisfaction and performance, *Ellison v. Cookson*, Vol. I, 100, and the notes, 112, 259.

(3) 3 Anstr. 882. Ante, Vol. V, 266, n.

(6) 3 Atk. 419. 1 Ves. 1.  
(7) 1 Ves. 519.

(4) Ante, Vol. VIII, 150. Post, Vol. XVII, 48.

(5) 2 Vern. 709. 1 P. Will. 324, and the references in Mr. Cox's note. Ante, *Twisden v. Twisden*, Vol. IX, 413.

(8) 3 P. Will. 211, 220. For. 80. *Deacon v. Smith*, 3 Atk. 323.

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 [ \*4 ]

and *Sowden v. Sowden* (9); where land, permitted to descend, was held a performance of a covenant to purchase. The former of those cases establishes, that there may be a part-performance.

The result of the authorities establishes a distinction between the cases of satisfaction and performance. The former have gone very much upon minute and subtle reasoning with reference to the intention: but upon the question of performance, a mere question of fact, the rules of equity are similar to those of law, and are not extended farther; and as to that it is sufficient, if the thing, covenanted to be done, is done; without reference to the intention; though the covenantor does nothing, and the effect is obtained by the mere operation of Law. In this case the share of the widow under the Statute, being only a third, would not satisfy her claim under the covenant, in the event, to a moiety of the personal estate: but it is a part performance; and therefore she is entitled only to so much more as will make up the deficiency. It is true, Lord *Thurlow* in *Kirkman v. Kirkman* (10) expresses a doubt, whether, if the question was now, the distributive share under the Statute ought to be held a performance: but he considered the point as bound by the authorities. His Lordship also in *Rickman v. Morgan* (11) considers the case of performance as depending ultimately upon the intention, and upon the same principle as satisfaction. That however is questionable, and the distinction is clearly recognized by Lord *Kenyon* in *Devese v. Pontet* (12).

There

- |                                                       |                                              |
|-------------------------------------------------------|----------------------------------------------|
| (9) 1 Bro. C. C. 582.                                 | (11) 1 Bro. C. C. 63.                        |
| Mr. Cor's note, 3 P. Will.                            | 2 Bro. C. C. 394.                            |
| 228. See ante, <i>Perry v. Phelps</i> , Vol. IV, 108. | (12) <i>Prec. Ch.</i> 240, Mr. Finch's note. |
| (10) 2 Bro. C. C. 95.                                 |                                              |

There can be no doubt, that this provision is a bar of dower: *Tinney v. Tinney* (13), *Walker v. Walker* (14), *Vizard v. Longdale* (15).

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GARTHSHORE  
v.  
CHALIE.

The *Attorney General*, Mr. *Richards*, and Mr. *W. Agar*, for the Defendant Mrs. *Chalie*.

[ 5 ]

As to the last point, *Vizard v. Longdale* is shaken by Lord *Rosslyn* in *Couch v. Stratton* (16). The question, whether dower is barred, or not, goes upon the intention. That was Lord *Hardwicke's* idea in *Tinney v. Tinney*; and Lord *Camden's* in *Villareal v. Lord Galway* (17).

Upon the principal question, whether the distributive share of the residue is to be taken as a part-performance or satisfaction of the claim under this covenant, there is no indication of that intention; and the intention must be looked to, as Lord *Thurlow* says in *Rickman v. Morgan*, both as to performance and satisfaction. The provision by this covenant was not intended to be a complete provision. The expression is, "for making *some* provision." There is no case near this in circumstances. Certainly *Blandy v. Widmore* and *Lee v. D'Aranda* are not. The authority of those cases is much shaken by *Hayes v. Mico* (18), *Devese v. Pontet*, and Lord *Thurlow's* observations in *Kirkman v. Kirkman*; who says also, that they can only apply to cases, where the whole is satisfied. In those cases the effect of the intestacy, being a complete performance and satisfaction, was held a *leaving*, within the covenant. They are certainly

(13) 3 *Atk.* 8.


(14) 1 *Ves.* 54.

(15) See the references to that case in *Couch v. Stratton*, ante, Vol. IV, 391.

(16) Ante, Vol. IV, 391.

(17) *Amb.* 682. See ante, *French v. Davis*, Vol. II, 572, *Strahan v. Sutton*, III, 249; and the note, I, 259.

(18) 1 *Bro. C. C.* 129.

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[ \*6 ]

tainly not to be extended. In this instance the whole is not satisfied. The time also, limited by the covenant, is six months after his decease: but she must wait till the end of a year for her share of the residue. The time of commencement therefore, as in *Richardson v. Elphinstone* (19), is not the same. This is not a question with creditors, \* but between the widow and mere volunteers, claiming under the Statute. *Pickering v. Lord Stamford* (20) establishes the right.

Mr. Romilly, in Reply.

The construction must be the same as to the real and personal estate: therefore the claim of dower is material. That claim cannot be sustained. It could not be intended to give the widow so great a proportion of the real estate as the entire moiety, and a third of the other moiety, leaving two-sixths only to descend to the heir: the object professed being to provide, not for the wife only, but also for the issue. The intention was only to give her a more ample provision than she would be entitled to by law. Suppose, the provision had been, that the wife, in case there should be no children, should have a moiety, and, if there should be children, a third, of the personal estate: could the intention be supposed, that she should have a moiety, or a third under the settlement, and the same proportion also under the Statute; or must not the effect of the settlement be taken to be merely an undertaking to die intestate?

Next, as to the authorities, it is said, the Judges have lately shewn much dissatisfaction at these cases of performance and satisfaction. But they have been always considered binding. *Haynes v. Mico*, was a question of satisfaction, proceeding upon the intention: not of perform-

(19) Ante, Vol. II, 463.

581. III, 332, 492. *Druce*

(20) Ante, Vol. II, 272,

*v. Denison*, VI, 385.

performance; upon which the question is, whatever may have been the intention, whether the party has done what he was bound to do. According to my note of that case Lord *Thurlow* confirms *Lee v. D'Aranda*; and takes the distinction between satisfaction, depending upon the intention, and performance; clearly not meaning to overturn those cases by any thing expressed in that judgment. That distinction is also taken by Lord *Kenyon* in *Devese v. Pontet*, and *Sowden v. Sowden*. The law cannot be different between a performance of the whole and in part only; and *Lechmere v. The Earl of Carlisle*, where the performance was in part only, is decisive upon that. It would be impossible in an action upon a covenant to recover more than what remained. The distinction, taken as to the time of payment, is not just. There is no rule, that the residue is not to be paid until the end of a year. If it can be sooner ascertained, that there are no debts outstanding, if, for instance, the executor had given an admission under his hand, the Court would compel an earlier distribution: the period of a year being only taken to give them time, in general cases. *Couch v. Stratton* was very shortly decided: but there the widow took only an interest for life in the greatest part of the fund; and the rest was given to her only upon a contingent event. Certainly no disapprobation of these cases was there expressed: much less was it intended to overturn them.

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GARTHSORE  
v.  
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[ \* 7 ]

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*The Lord* CHANCELLOR.

Feeling, as Lord *Thurlow* did upon this point, that authorities clash with authorities, and it is extremely difficult to reconcile them, and therefore to be certain, that I am right in the principle drawn from them, I think it better to give the judgment I have formed, not without considerable doubt, than to delay it. The question arises upon the construction of a contract between

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[ \*8 ]

tween parties, to stand in the relation of husband and wife; who might therefore either expressly stipulate with each other; or, if they thought proper, act upon the implied stipulations the law would make for them. \* But it is material, that it is a contract, which may have reference to what the wife and children might be entitled to claim of the husband's property; and upon such a contract, as Lord *Hardwicke* says, it is not unnatural to consider it with reference to the rights they would have upon his property at his death, if no such stipulations had been entered into. Though the professed object of the husband's covenant is for making some provision for his intended wife, and for the issue, there is no provision expressly for the issue; and clearly it was competent to the father by act in his life, or at his death, to disappoint every expectation of what the issue were to derive immediately from him; and the hope, that the wife, taking an interest from her husband, might be enabled to provide for them, is of a nature, that cannot be called a provision. But it is a circumstance, that shews, the parties were contemplating the case, that issue, if there should be any, might be the next of kin. The period of time, specified in the covenant, six months, has been in cases of satisfaction considered material; and in cases of performance little regard has been paid to it by the Court.

This settlement is not like most, if not all, in the cases referred to: viz. by an engagement to provide for the wife, by leaving, paying or securing, a sum of money. But the scheme of this settlement is to increase that proportion of her share of his personal property at his death, beyond what she would take, if he should die intestate: her title also being a mixed title to an interest in his real as well as his personal estate. The cases, that have been referred to, commence with *Blandy v. Widmore*. Formerly that case, and *Lee v. Cox*, commonly

monly called *Lee v. D'Aranda*, were respected as unquestionably good authorities; and I do not recollect any thing passing in this Court, that went the length of disputing, whether those decisions were right. It is material to observe, what are the avowed principles, as founded in analogy, upon which those cases are supposed to be determined. In *Blandy v. Widmore* the next of kin were not children. Lord *Kenyon* in *Devese v. Pontet*, according to a note, supposed to have been corrected by his Lordship (21), uses the expression, that in *Blandy v. Widmore* there was a legal performance of the covenant. In that case the Court must have understood the intention to be, that, if the wife took a share of the personal estate, that share would satisfy her in the construction of the covenant as between husband and wife: the rather, as the analogy referred to is to be collected from the case of *Wilcocks v. Wilcocks* (22). It is now settled, whatever may have been Lord *Thurlow's* difficulty, that, if there is a covenant to purchase and settle lands upon the first and other sons in tail male, and the party purchases lands of less, equal, or greater, value than the sum he covenanted to lay out, taking a conveyance to him and his heirs, and dies, leaving a son, who would be tenant in tail under the settlement, and a grand-daughter by an elder son, deceased, upon whom, no settlement being made, the lands descend, that purchase would be, not in all senses a performance, but a sort of mixed case between performance and satisfaction, that would bar any demand against the assets of the grandfather. The case of *Sowden v. Sowden* proves that beyond all controversy. The father there under the covenant to lay out 2000*l.*, had no intercourse with the trustees upon the purchase he made for 2150*l.*

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Covenant to purchase and settle upon the first and other sons in tail male: a purchase of less, equal, or greater, value, and the conveyance taken in fee, held in performance and satisfaction.

(21) The note published by Mr. *Finch* in his edition of *Precedents in Chancery*. It was so stated at the bar. (22) 2 *Vern.* 558.



## CASES IN CHANCERY.

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[ \*10 ]

2150/. He advanced nothing to them. They therefore laid out nothing. But taking to himself that purchase, so made with more money than he had covenanted to lay out, he permitted it to descend; and Lord *Kenyon* said, it was much too late to argue it; and was clearly of opinion, that the purchase must be taken to be in performance of the covenant; or, as he expresses it, an act done towards performance of it. It would have been satisfactory, if Lord *Kenyon* had considered Lord *Thurlow's* difficulty. Upon the principle of Lord *Kenyon's* decision it is very difficult to say, that, when once you have marked that act, as done towards performance of the covenant, you could permit the effect to be done away by any subsequent accidents. It would therefore impose upon the grand-daughter the necessity of parting with the estate descended upon her, unless *præsumptio juris et de jure* could be raised, or it could be made out by evidence, that it was not an act done towards performance.

In a case (23), intermediate between *Wilcocks v. Wilcocks* and *Sowden v. Sowden*, it is said truly, a man cannot buy all the land, covenanted to be bought, at once; also, that he cannot find land precisely of that value. Those circumstances therefore do not tell much. But in the expressions of the Judges we cannot find to what extent they felt that they must press the consequences of their opinion in all the circumstances, that might occur between different branches of the family. With respect to *Blandy v. Widmore*, if the case were quite new, it would be difficult to answer *Hooper's* argument; which embraces every topic, that has been urged in subsequent cases. The observation is, that the covenant constitutes nothing more than an ordinary debt; and performing that by payment you do not advance to the consideration of the

(23) *Lechmere v. The Earl of Carlisle*. See 3 P. Will. 228.

the undisposed residue; which the law gives, and not  
 • the party. He also observes the distinction, relied on  
 in *Lee v. Cox*, that, if it is said, the party *left*, it cannot  
 be said, he *paid*. The *Lord Chancellor* says, the intes-  
 tate has left his widow 620*l.*, and upwards, "which she,  
 "as administratrix, may take presently upon her hus-  
 "band's death." These are the words Lord *Thurlow*  
 adverts to (24), as having been much relied on. But  
 what is their wonderful efficacy? Can it be said, that,  
 if the widow gets the administration, she shall have the  
 620*l.* satisfied out of her share of the residue; but if  
 she does not choose to take it, and some other person  
 administers, it shall not be so satisfied? Next what is  
 meant by her being able to retain it? As to her distri-  
 butive share, she could retain it only by paying it to  
 another person; for in her own hands it would remain  
 liable to all debts unsatisfied in the course of a year.  
 If she could only have it in the character of administra-  
 trix, she could not have it as wife. According to Lord  
*Thurlow*, as represented in *Kirkman v. Kirkman* (25),  
 it seems to turn upon the fact of administration; and  
 not upon the ground, on which the Court seems to have  
 decided; that the wife and issue taking by the Law  
 some interest in the personal estate of the covenantor,  
 if he died intestate, the construction of the covenant  
 upon the whole intention between such parties should be,  
 that the property, the wife would take in consequence  
 of that circumstance, should be applied in performance  
 of the covenant; that a man required to do something  
 actively, should be considered as performing his cove-  
 nant by a passive permission of the descent of an estate;  
 which *prima facie* and without the presumption of this  
 Court cannot be considered an act according to his  
 covenant.

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 GARTHSHORN  
 v.  
 CHALICE  
 [ \*11 ]

In

(24) 2 Bro. C. C. 132.

(25) 2 Bro. C. C. 132.

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CHALIE.

In the next case, *Lee v. Cox*, it is clear, Lord *Hardwicke* thought, the circumstance, that the wife was administratrix, was by no means the leading or only circumstance, upon which the case was to be decided; though he noticed it, as relied on by Lord *Cowper*. According to Mr. *Joddrel's* note of that case the Lord Chancellor concludes, that the distributive share was a performance. He said it was exactly similar to *Blandy v. Widmore*: there was no breach in his life-time; which distinguishes it from *Oliver v. Brickland* (26); which is right; the covenant having been broken in his life; that the distinction, that the covenant in the case before him was to pay, and in *Blandy v. Widmore*, to leave, was much too slight for this Court to form any difference upon it in its judgment.

So Lord *Hardwicke* approves the case of *Blandy v. Widmore*; and I am satisfied of that by his own note; for during the *Attorney General's* argument, pressing the topics, that have been urged in this case, Lord *Hardwicke* repeatedly makes this short note: "*Blandy v. Widmore* is in answer to this." Both the printed and manuscript authorities therefore sanction that case, as good law in this Court, upon the construction of a covenant between husband and wife, as to what one party is to have at the death of the other; that it is to be construed with reference to the circumstance, that there is a claim upon the property, independent of the covenant, and does not go upon the accident, whether the wife takes administration or not; and I should have regretted to find, that it depended upon that circumstance; that in the one case, not taking administration, she is to have both; but if on behalf of her children

children she takes administration, she is not to have both. Those cases are distinct authorities, that, where a husband covenants to leave, or to pay at his death, a sum of money to a person, who, independent of that engagement by the relation between them, and the provision of the law, attaching upon it, will take a provision, the covenant is to be construed with reference to that (27); and the Court will not look upon the slight difference between leaving and paying, or whether payment is to be within three months or six months. In that respect there is always a difference upon what is to be taken, in a sense, at the end of twelve months, but which, I agree, in another sense is to be taken from the death of the testator; for the other period is only for convenience; and, there is no doubt, the property is vested at the death of the party; and, if a case was produced, in which it was quite clear, that there were no debts, the Court would give the fund to the party, notwithstanding there not had been a lapse of twelve months.

Those cases, *Blandy v. Widmore*, and *Lee v. D'Aranda*, stood without imputation until *Haynes v. Mico*; which came on very soon after Lord Thurlow became Chancellor. In *Barret v. Beckford* both the argument and the decision admit the authority of *Blandy v. Widmore* and *Lee v. D'Aranda*: but under the particular circumstances it was held, that the disposition of a moiety of the residue could not be called a performance; and there was not similarity enough between the provisions to make it a satisfaction; and it was observed, that they did not come out of the same fund. In *Haynes v. Mico*, where the testator had bound himself to leave to his wife 300*l.*, to be paid in one month after his decease, and by his will gave her 500*l.*, payable within six months after his decease, Lord Thurlow at first found it very difficult

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Covenant by husband to leave or pay at his death to a person, independent of that engagement entitled by law to a provision: the construction is to be with reference to that; and the slight difference between leaving and paying, or whether within three or six months, not attended to.

The year allowed to executors and administrators only for convenience; and does not prevent vesting.

(27) *Goldsmid v. Goldsmid*, 1 Swanst. 211.

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 ~~~~~  
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difficult to say, the 500*l.* should not be a performance, or a satisfaction, if not a performance, and to distinguish it from *Blandy v. Widmore*, and *Lee v. D'Aranda*: but after a strong inclination to hold it a satisfaction, he found himself obliged to consider, whether it was a performance; being of opinion, that if not a satisfaction, it was not a performance; and, that according to *Clarke v. Sewell* (28), and other cases, if the party was a mere stranger, the difference of the time of payment was not enough to shew, the one was debt, and the other bounty. It is impossible to state a slighter difference: but Lord *Thurlow* thought it sufficient to determine, that the latter provision was not a satisfaction. I believe also, it is accurately stated upon Lord *Thurlow's* authority, (notwithstanding what his Lordship is represented to have said in another case (29), and if in *Blandy v. Widmore*, and *Lee v. D'Aranda*, what was taken in the second instance was properly held a performance, because it was more, it must, if it had been less, have been taken to be a part-performance. Upon that case and *Devese v. Pontet* I think myself entitled to say, as Lord *Alvanley* held in a subsequent case, it was not the intention of Lord *Thurlow* and Lord *Kenyon* to shake *Blandy v. Widmore* and *Lee v. D'Aranda*; and they are unshaken.

It is very difficult to answer the objection, that the wife in *Devese v. Pontet* might have been *ensient* at the testator's death; and the question put by Lord *Kenyon*, how the residue, given to her absolutely, was to be a satisfaction of that, which in one event, that might have happened at the testator's death, was given to her but partially; viz. for life only. I cannot go along with the language, which puts great stress, as applying to

(28) 3 *Atk.* 96.

(29) *Kirkman v. Kirkman*,
 2 *Bro. C. C.* 95; see p. 100.

to residue, upon those particular circumstances; whether it was given within six months or ten months, &c. There is not much weight in those expressions, for he must be considered as applying those limited periods to residue, as he could apply them to residue. *Couch v. Stratton* seems to fall under the same consideration. The judgment is extremely short: but I take it to mean, that the covenant was entire; and, therefore, if the 5400*l.*, not given absolutely, could not be considered satisfied out of the distributive share, neither could the 1500*l.* The former stands upon the same principle as *Devese v. Pontet*. The judgment, that resorts to the entirety of the covenant against satisfaction, seems to admit, that it is questionable, whether, if that circumstance had not occurred, the judgment ought not to be otherwisc. It does not contradict the former cases, or mean to shake them.

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Next, if *Blandy v. Widmore*, and *Lee v. D'Aranda*, are to be considered as authorities, do the circumstances of this case distinguish it from them: First, it is said to be distinguished in this respect, that the widow's share under the Statute, being one third, is less than the share she was to take under the settlement, and that brings it to the question, whether, if upon the ground of performance the distributive share may be applied in satisfaction, a part-performance may not be applied in part-satisfaction. Lord *Hardwicke's* principle means, that what the wife could get of the distributive share she would take in performance. Why is it put upon this ground? The reason is, that the party has recovered what she could recover by the obligation. In an action she would have recovered the whole; and the covenant would be performed. But it must follow, that if she had received a part, she could recover nothing as covenantee, but what would satisfy her as much as in the other

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 GARTHSHORE  
 v.  
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other case she would have been satisfied by receiving the whole; and in *Barret v. Beckford*, which occurred soon after *Lee v. D'Aranda*, those cases are considered as establishing in principle, not only what performance, but what part-performance, would do. If the principle is, that the husband, looking to the event of his death, in which event she will have an interest in his property by operation of law, therefore declines to give her any interest in his life: this Court adverting to the circumstance, that she will take part of his property at his death, (and the Court must advert to that), it is very difficult to say, that, if she receives 1000*l.*, in discharge of 1000*l.*, that sum being her residuary share, she takes it in full satisfaction of 1000*l.* covenanted to be paid to her, as it is the full amount; but if her share in the residue amounts only to 999*l.*, she shall have, not merely the additional pound, but the sum of 1999*l.*, (for that must be the consequence); where the residue may be only 2000*l.*; and she may be contending with others than her children. That is not the natural or the legal meaning of such a covenant.

It is said, there is a difference: as subsequent cases have determined, that, where a testator by Will gives a sum of money, payable under different circumstances from those attaching upon the sum under the covenant, *Blandy v. Widmore* and *Lee v. D'Aranda* do not apply. First, in those cases the testator by his covenant was bound to pay, or to leave a particular sum of money: next, the question does not arise, whether he meant, the intestate's residue should be applied to that particular sum of money so given: but when the testator sets about an act, expressly and actively giving to his wife, the question must always be both upon his meaning, when executing his covenant, and, whether the meaning of both is satisfaction by the latter; and those cases  
upon

upon this principle have been universally stated as cases, that are not to disturb the law, if the question is what is to be done with reference to the intention of the covenantor as to the intestate's estate, if he should happen to die intestate.

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v.  
CHALIE.

But this case goes farther; for whatever may be the right decision upon all the cases together, considering *Blandy v. Widmore* and *Lee v. D'Aranda* as cases of covenant for a stipulated sum and an intestacy, and the latter cases, as cases of covenant for a stipulated sum and a legacy, which *prima facie* imports a bounty, and an intention of kindness, absent in the case of intestacy, this is a case, in which the covenantor, regarding the connection he was about to form, that it might produce children, and that the rights of both his wife and children in his property upon an intestacy would be fixed by the Law, does not covenant to leave, or order his executors to pay to her a particular sum; but says, he will alter the proportion, in which his widow, and his children, or, if none, his next of kin, shall take his property; providing therefore for the circumstances; in what proportions those shall take his property, who, if he died intestate, would take in given proportions the property, with reference to which he was making a provision. There is no positive provision for the issue, I admit. But they had in contemplation, that there would be issue; and therefore means were to be used to provide for them, or to enable others to do so. You must therefore consider, what would naturally be the meaning of persons, having that in contemplation.

Whatever is the doctrine upon a Will, which is very well stated in *Pickering v. Lord Stamford*, and agreeing with dower and thirds does not

bar the widow from taking under an intestacy, by the failure of a legacy.



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v.

CHALLER.

Distinction  
upon a mar-  
riage agree-  
ment.

with that case, which is an authority, that the widow is not barred in such a case, because the intention was to bar her from her thirds for the sake of persons, under that instrument to take the residue, I do not know, that it will apply to a marriage agreement; for soon after *Blandy v. Widmore*, upon a marriage agreement the direct contrary of that was held in *Davila v. Davila* (30); that the true meaning of such an agreement between husband and wife was, that the wife, receiving that sum of money, should consider herself, as if she had not survived her husband.

Upon these cases then the question is, whether, where a sum of money, or a proportion of the testator's property, is to be given, I am authorised to say, the intention was, that the wife, receiving such a provision, in the one case by the payment of a sum of money, in the other by a proportion of the estate and effects, is to accept that in lieu of her thirds of the personal estate. Suppose, this were a covenant for a third, if there should be children, and for half, if none; the question would be, whether upon the whole instrument that is more or less than that as to her, if he does not make a Will, giving her so much, he should be considered as intestate; and, that, notwithstanding any disposition,\* she might claim, as if he had died intestate. It is very difficult upon that to say, there ought to be a difference, because the terms are more in her favour, than they would be in that case. It is also very difficult, and it is not natural, upon a marriage agreement, contemplating the rights upon the marriage and the dissolution, to suppose an intention, that she should have both. These arguments, that it is natural or unnatural, are not very conclusive; but in aid of others assist the reasoning. If it is considered material,

(30) 2 Vern. 724.

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CHALIE.

material, for whom he is to be supposed a purchaser, the answer is, for those for whom he may happen to be so. He contemplates no other relation than issue; for no other is mentioned. He might have defeated them: but his means of providing for them might be supplied either by testament or intestacy. Contemplating upon the face of the instrument, that there might be children, it is not natural, that he should intend to give to his widow one moiety as against the children, and that the effect of the Statute of Distributions should also give her as against those children, from whom under the express stipulation she had already taken more than she would under an intestacy, one third more than would have been supplied to the children passively under an intestacy. Another circumstance is, that there is a material difference between a sum of money secured by a covenant, and given by a Will, and a proportion of effects given by a covenant, and accruing by intestacy: especially, if the proportion under the covenant is a proportion of effects constituting residue; for it is more easy to suppose, the covenantor, agreeing, that his wife should take a proportion of his residue, meant, she should take it, when the residue was formed, than that a man, who has secured an ascertained sum by a covenant, meant that to be satisfied, as a sum of money, constituting a debt, as such, out of such a thing, composed in such a way, as a residue is. If I am not to take the husband to be a purchaser for his issue, still it is a circumstance to be regarded, that in *Blandy v. Widmore*, *Lee v. D'Aranda*, and *Davila v. Davila*, the satisfaction was out of a residue, which did not go to children.

Next, is this a covenant, that the widow shall take this proportion of the residue, or of the specific personal

B 2

estate?

1804.

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v.  
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estate? As to that I was too hasty in expressing (31) a strong inclination, that this covenant had gone much farther than I now think it goes; for, unless the Court is bound by express terms, it must be taken to mean clear personal estate; whatever it means as to real estate. The covenantor was left at full liberty to sell, alien, mortgage, dispose, and incumber, during his whole life; and if so, those, who contend, that the specific personal property of the testator at his death is the subject, upon which this covenant was to attach, must say, that, though he was at liberty during his whole life to contract debts, yet at his death this proportion of his specific personal property could be abstracted from the obligation to pay his debts. Where is that to stop? Suppose, he had covenanted, that his trustees should deliver the whole personal estate. The true meaning of such a covenant must be, that what is the testator's personal estate at his death is the subject to be divided; and that only is his personal estate at his death, which is his in the ordinary sense, *i. e.* after his debts paid. This is embarrassed by being a mixed case of real and personal estate: but if it cannot be said, that the real estate also is to be taken after the debts paid, it will not follow, that the personal estate is not liable to them. I think, the mere circumstance of mixing it with real estate would not alter it from what would be the effect, if there was personal estate only. It is enough to say that; without going into the consideration, whether he did not mean a clear fund both of real and personal estate to be divided.

Implied bar  
of dower by  
a provision  
under a cove-  
nant in the  
marriage set-  
tlement.

Another question is, Whether this is a provision in bar of dower. If it were necessary to decide that, it must be decided, as if a bill had been filed immediately upon

(31) During the argument.

upon the death, calling upon the heir to convey in fee one moiety of the real estate, and also to assign by metes and bounds one-third of the other moiety; and the true question is, not upon *Vizard v. Longdale*, but upon the whole, whether that was not intended to be the provision, which in every view she was intended to have as between him, her, and his heirs, executors, and administrators; and I do not think, if that was now before me, that this case might not be so taken.

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GARTHSHORE  
v.  
CHALIE.

I am bound to consider, in construing this settlement, what would have been the case, if Mrs. *Chalie* had died intestate, and her son had received 2500*l.*, as the distributive share of her property. It would have been impossible to have got his case out of *Blandy v. Widmore* and *Lee v. D'Aranda*; and if so, that circumstance, though not decisive, is to have weight in considering the whole effect of this instrument together. Upon the whole it was not the intention, that this Lady should have more than one-half under the circumstances, that have happened; and accordingly she must be declared to be entitled to a moiety of the residue of the personal estate.

1804.

## THE ATTORNEY-GENERAL v. STEPNEY.

July 9th.

Bequest of the residue of personal estate for the use of the *Welch* Circulating Charity Schools, as long as they should continue, and the increase and improvement of Christian knowledge and promoting religion, and to purchase bibles and other religious books, pamphlets, and tracts, as the trustees should think fit, to go to the same uses with those already bought, and to be kept in a house, devised for that purpose.


The devise of the house void: the per-

sonal bequest sustained, as a general charitable purpose of promoting Christian knowledge; to be executed, regard being had, as far as reasonably may be, to the particular Charity pointed out; with checks, making it consistent with the establishments of the country, viz. as to unlicensed schools, itinerant preachers, &c.

**B**RIDGET BEVAN by her Will, dated the 27th of October, 1779, devised a house in the county of *Caermarthen* with other premises to trustees, and their heirs, upon trust to deposit in the house all the bibles, testaments, and other religious books and tracts for the use of the *Welch* Charity School for the increase and improvement of Christian knowledge, which she should have at her death, and all other books and tracts, as in pursuance of the trusts after declared should be purchased for the said charitable purposes, or should be given by the charitable and well-disposed persons; and to preserve and keep all the books and tracts in the house for the said uses; and for that purpose to permit her servants, whom she named, or such of them, who should look after the books, to live in the house clear of rent and taxes; directing, that they should live there during their respective lives, notwithstanding the books might have been given away, or otherwise disposed for the purpose of the Charities. She directed her executors to put various articles of furniture into the house, to be enjoyed with it, during the time the same should continue in the occupation of the said persons under the trust, and afterwards to go in the same manner as the residue of her personal estate not specifically disposed of.

The testatrix afterwards reciting, that there was and probably might be at her death several bibles and religious books, pamphlets, and tracts, bought with the contributions

contributions of several well-disposed persons for the use of circulating *Welch* Charity Schools and for the increase and improvement of Christian knowledge, and some cash and securities, from contributions for the like purposes; and that she was by the Will of the Rev. *Griffith Jones* entitled to his personal estate, which he meant to bequeath to her with an intent to pay some legacies, and then to pay the surplus to charitable uses, gave and bequeathed to her trustees, their executors, &c. all and every the bibles and other religious books, pamphlets, and tracts, which she might have in her possession and keeping, at the time of her decease, arising from such contributions, as aforesaid, together with all and every the books and other effects and personal estate of *Griffith Jones*, which she might be possessed of at her decease, and also all her own personal estate whatsoever, except what she should otherwise dispose of; upon trust, after payment of her debts, &c. to pay, apply, and dispose of, the residue of her said personal estate for the use of the *Welch* Circulating Charity Schools, as long as the same should continue, and for the increase and improvement of Christian knowledge and promoting religion, in such manner as the trustees for the time being should think most proper and conducive to the said charitable purposes; and moreover, that they should purchase from time to time new bibles and other religious books, pamphlets, and tracts, as they should think fit, for such pious uses and purposes as were intended concerning those already bought; and should apply and dispose of the said books, effects, and personal estate, accordingly; and in the mean time should deposit all the said bibles, books, pamphlets, and tracts, in the said house, allotted for the keeping and care thereof. The Will contained a provision for keeping up the number of trustees during the continuance of the said trusts by the appointment of the survivor; and appointed

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pointed the trustees named and two other persons, executors.

The testator died in 1779. The information was filed for the purpose of establishing the Charity. Under a decree, directing an inquiry into the nature of the establishment, mentioned in the Will, the Master's Report stated, that the said institutions or establishments were generally known by the name of "The *Welch* "Piety," or "The *Welch* Circulating Charity Schools;" the nature and purposes of which were to teach the poor ignorant people the *Welch* language, and to teach men, women, and children, of all ages, to read; who, by reason of their poverty were unable to pay for learning, and in some places to write, and for that purpose to find them bibles and other religious books; and also to teach them the Church Catechism, &c. and to instruct them in the principles of the Christian Religion according to the Church of *England*; and that the said institutions were commenced by *Griffith Jones* in 1733, with the assistance of the Society for the promotion of Christian knowledge, and the voluntary contributions of himself and others; and that the manner, in which the said institutions were conducted by *Griffith Jones*, was by sending *Welch* school-masters to the several parishes of *North* and *South Wales*, to open schools at the request of the officiating minister and parishioners, who sent petitions for that purpose; appointing inspectors to examine the scholars, and to see, that the Masters attended to their duty. The Report stated several other regulations; and that after the death of *Jones* the testatrix managed the whole; appointing and paying the school-masters and inspectors; purchasing books, &c.

The cause coming on for farther directions, the question was, whether this charitable disposition, with

with the exception of the house, could be supported?

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The *Attorney General*, Mr. Piggott, and Mr. Richards, for the Information, contended, that this case ought to go to the Master to consider of a scheme; insisting, that, if the opinion of the Court should be, that the disposition of the books was so connected with that of the house, that they must fail together, yet under the other part, the general direction for charitable purposes, it may be supported. Certainly, where the principal part affects land, and the other is a mere accessory to that principal, as the case of alms-houses, and a provision for annuities to the persons inhabiting them (32) or a chapel, and a provision for the salary of the minister, the second object, so necessarily dependent, must fall with the principal: but it is inverting that to say, that, where the accessory is bad, the principal shall fail. The object in giving this house was only to accommodate the charity to a certain degree by supplying a place to keep the books in. But that is by no means of the essence of the charity; or so connected with it, that the charity can be affected by the fate of that subsidiary purpose. That both are directed to the same object is not sufficient. The purpose of promoting Christian knowledge is good; and in *The Attorney General v. The City of London* (33) directions were given for executing that charity, after the independence of America was acknowledged. The object of this testatrix was the established Religion; and your Lordship will control the discretion of the trustees with reference to that object.

Mr.

(32) Ante, *The Attorney General v. Whitchurch*, Vol. III, 141.. *Griever v. Case*, I, 548.

See the note, 554.

(33) 3 Bro. C. C. 171, .



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Mr. Romilly, Mr. Fonblanque, and Mr. Cullen, for  
the Defendants.

*The Lord CHANCELLOR.*

The testatrix clearly thought, the charity might be discontinued before the death of the persons she intended to live in the house. As far as she speaks of the house, she meant, the books and tracts should be deposited and taken care of in the house for the purpose of the charity, while any of the parties lived, if the charity so long subsisted; and after their deaths that so much of the furniture as was not worn out should be sold for the purposes of the charity; from which it seems she meant the charity should be maintained, as long as her property would support it. Her declaration is general, that *Jones's* property was given to her for charitable uses; though upon the Report no doubt can be entertained, that this particular charity was meant. The establishment of a school of this sort involves circumstances, to be looked at with great jealousy; conducted under no authority: the school-master appointed under the sanction of no licence: the nature of the books, beyond Bibles and Testaments, not at all ascertained; and the residence of persons sent to different parts, regulated upon a system directly contrary to the establishment of this country; which gives the School-master a connection with the place for life. When we know also the actual use, that is made of itinerant preachers, especially allotting to each of them a temporary residence, that makes them more mischievous than they would be without such a system, a great deal is to be guarded against, before the Court can establish, and give its countenance to, the plan. But if no other objection can be made, it is very difficult to say, there is not to be found in the Will enough to shew the general intention and charitable purpose of promoting Christian knowledge; and it would

would not be difficult to decide, whether this system is to be permitted to go on under no other checks than it provides; or, whether this Court looking at the object of the institution, would secure that object by applying those guards and checks, which the law applies to interests of a similar nature.

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In the way of that general question I know no case except that, which I shall always speak of as great authority on account of the Judge, by whom it was decided, I mean the case of *Browne v. Yeall* (34); in which Lord *Thurlow*'s opinion was, that the testator, not having given this Court more of specific direction as to the nature of the books, to be purchased and circulated, than that they were to be such as may have a tendency to promote the interests of virtue and religion, and the happiness of mankind, had not given direction enough; and therefore Lord *Thurlow* held the next of kin entitled. If this was that very case, I should certainly feel myself bound to follow that decision. But this, independent of the peculiarities belonging to it, is very different; and if that Will had specified Bibles and Testaments, the Court could not have refused to execute that purpose. If therefore there was nothing more in this Will, I should be bound to say, that, whether there is more or less objection to the words "other religious Books and Tracts," there is a denotation of a religious purpose, to which the fund may be applied, with an option, how it should be applied; and I must execute one term of that option.

The next objection is, that the testatrix contemplated a charity, that was to have continuance; and did not mean,

(34) Stated ante, Vol. VII, authorities on this subject are considered. See the note, Vol. I, 469.  
60, in the note to *Moggridge*  
v. *Thackwell*; where all the

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mean, if it was not to have continuance, to devote it to any charitable purpose whatsoever. But upon the whole she contemplated the two events; that it might or might not have continuance; and when the charity subsisted upon voluntary contributions, of necessity it could last only while the subscriptions lasted; and the testatrix meant, looking to the continuation of the subscriptions, but knowing, they might fail, that, as long as her personal estate would supply the purposes of this charitable institution, so long it should be applied. That therefore is no objection. I am also of opinion, that there is expression enough in this Will to compel me to say, that even if that charity had not continued, and she meant, it should be applied to that, she yet meant more; and has provided for charitable purposes, that might or might not be connected with that charity; and the distribution of books for the promotion of Christian knowledge is expressed so, that it appears, she did not mean her purpose to fail, if the particular mode of promoting Christian knowledge by this plan as to *Welch* schools did not take effect. There is enough therefore to compel me to say, that even if those charities had ceased, this property must be applied to the charity, to which she was adverting. If it were otherwise, it would be very difficult to say, it should not be applied to charity; that is, that a discontinuance of the charity, operated by her own act, would authorize her to take the personal property of the testator; which she ought to have applied to give continuance to the charity, as long as it could continue.

The next consideration is, whether upon the whole taken together this charity, of whatever nature, is so engrafted into, connected with, and placed upon, an establishment in real property, that the charity cannot subsist, as the real estate is so given. I was originally,  
when

when I directed the reference as to the nature of the *Welch* Charity, of opinion, that was not the case; and I am still of opinion, that it is not necessarily to be executed in that house. First, that house she meant should be subservient to the distribution of her books: but it is not necessarily connected with her purpose; for the Will contemplates the time, when the Charity might continue, and the house might be no longer applicable. Next, contemplating the circumstance, that the Charity might not continue, she meant to give her property, generally, to charitable purposes, connected with a scheme for the promotion of Christian knowledge. Upon the whole therefore there is not enough to bring it within the authority of those cases, where, the principal devise of the land having failed, the bequest of the personal property is so connected with it, that it must fail too. There is enough in this Will to give the personal property to charitable purposes, connected with the plan of promoting Christian knowledge.

They must therefore propose a scheme; regard being had, as far as reasonably and properly may be, to that species of charity, which appears to have been in the contemplation of the testatrix at the time of making her Will, denominated "*The Welch Charity*;" and the Master will fail in executing the purpose of the Court, if he does not attend to the circumstances, how far it is necessary to place checks upon such an institution, for the purpose of making it conformable to the establishments of the country; as they provide for the propagation both of religion and learning. An unlicensed school would not be consistent with that view, which this Court ought to take of such an institution, carrying it into effect, in the execution of such a plan.

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1804.

*July 11th.*

Order on motion and consent, that a petition of appeal from the *Rolls* may be withdrawn.

## THOMSON v. THOMSON.

**T**HE Plaintiff appealed from the decree (35) at the *Rolls*.

Mr. *Cox*, for the Plaintiff, moved, that the Plaintiff may be at liberty to withdraw his petition of appeal; stating, that the parties had come to a compromise; but expressing some doubt, whether this was the proper course.

Mr. *Abercromby*, for the Defendant, consented.

*The Lord* CHANCELLOR granted the motion upon the consent.

(35) Ante, Vol. VII, 470.

1804.

*July 11th.*

Upon a decree, taken by default of the Defendant at the hearing, the evidence is not to be entered as read.

## STUBBS v. ———.

**T**HE Defendant making default at the hearing, the Plaintiff in the usual way took such decree as he could abide by: but, desiring the evidence to be entered as read, the Register objected; stating the practice to be, not to enter the evidence as read; as there can be no appeal against a decree so taken.

*The Lord* CHANCELLOR said, he would abide by the practice; and ordered, that the evidence should not be entered as read.

DODSON v. JUDA.

1804.

July 2d, 1804.

**M**R. *WOODDESON*, for the Defendant to a Bill of Discovery, moved for the costs.

Abatement by the marriage of a female Plaintiff in a bill of discovery after Answer. The Defendant cannot have the costs.

Mr. *Roupell*, for the Plaintiff, objected, that the Plaintiff, who, when the bill was filed, was a *feme sole*, having married, the suit was abated; and could not be revived for costs; observing, that if execution was taken out for the costs, it must be in her maiden name; and there is no such person; and the husband could not be liable; being no party to the suit.

The Lord CHANCELLOR inclined against the objection; but directed a search for precedents; and afterwards upon the case of *Gould v. Barnes* (36) held the objection good, and refused the Order (37).

(36) 1 *Dick.* 133.

(37) Mr. *Beames* in his *Summary of the Doctrine of Courts of Equity with respect to Costs*, 34, 101, 198, 9, states from the Register's Book, that there is no Order to the effect stated in *Dickens*: on the contrary there are two Orders; one for setting down the plea to

the bill of revivor, the second for reviving, the plea being over-ruled; concluding therefore, that *Dodson v. Juda* rests, not upon *Gould v. Barnes*, but upon this; that until revivor the Defendant could not be heard: and he could not revive for costs merely.

ROLLS.

1804.

July 12th.

Appointment of 100*l.* South Sea Annuities to one child, and 2400*l.* the residue of the fund, to the other, those being the only objects of the power, not illusory.

[ \*32 ]

## BAX v. WHITBREAD.

**BY** settlement, previous to the marriage of *William Caslon* with *Elizabeth Cartlitch*, it was declared, that 2500*l.* Old South Sea Annuities, the property of *Elizabeth Cartlitch*, should be vested in trustees, in trust, after the marriage, to permit *William Caslon*, during his life, to receive the dividends, &c.; and after his decease, in case the said *Elizabeth* should survive him, for her in the same manner, and after the decease of the survivor, or in their life-time, if they or the survivor, should direct by deed, &c. that the trustees should assign, apply and dispose of, the capital, and the dividends, &c. unto and amongst all and every the son and sons, daughter and daughters, of *William Caslon* and the said *Elizabeth*, and the child or children of such sons and daughters, in case any of them should be then dead, leaving issue, in such parts, shares, and proportions, and at such time or times, and in such manner as *William Caslon* and the said *Elizabeth*, during their joint lives, or as the survivor, by Will or Deed, with two witnesses, should appoint; and for want of such appointment, equally between all and every the children, who should attain the age of twenty-one, or being daughters, being married; and all and every their grand-children, or other issue, lawfully to be begotten, then living, descendants from any such their children, then dead, who should live to attain that age; or, being females, being married: such grand-children, or remoter issue, to be entitled equally and proportionably between them; as the parents would, if living; and if there should be but one child at the death of the survivor of the husband and wife, to that one, his executors, &c.; and, in case there should be no issue, to the survivor of the husband and wife, his or her executors, &c.

The

The issue of the marriage was two sons, *William* and *Henry*. *William Caslon*, the father, died before any appointment. *Henry Caslon*, in 1785, married, and died in the life of his mother, leaving issue one child, *Henry*. In 1792, *William Caslon*, the son, became a bankrupt; and, in 1795, he obtained his certificate.

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BAX  
v.

WHITBREAD.

*Elizabeth Caslon* by her Will, dated the 2d of *May*, 1794, and executed, as required by the settlement, reciting the settlement, &c. directed and appointed, that the trustees should immediately after her decease transfer, &c. the stock and dividends unto and between her son *William Caslon*, and her grandson *Henry*, in the shares and proportions, and at the times and in manner after mentioned; viz. the sum of 100*l.*, part of the said capital sum of 2500*l.* Old South Sea Annuities, and the interest, &c. to accrue after her death, unto her son *William*, his executors, &c. within three months after her decease, to and for her own use and benefit; and the sum of 2400*l.*, residue thereof, with the interest, &c. unto her said grandson *Henry*, when he should attain the age of 21, to and for his own use and benefit absolutely.

[ \*33 ]

The bill was filed by the assignees under the Commission against *William Caslon*; praying, that the appointment may be declared illusory and void; and that the Plaintiffs, as assignees under the Commission, may be declared entitled to a moiety of the stock, &c.

Mr. *Hollist* and Mr. *W. Agar*, for the Plaintiffs.

Mr. *Romilly* and Mr. *Horne*, for the Defendants, were stopped by the Court.



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*The MASTER of the ROLLS*, referring to his decision in *Butcher v. Butcher* (38), held the appointment not illusory; and decreed accordingly (39).

(38) Ante, Vol. IX, 382. the decree, post, Vol. XVI, 15; and the note, ante, I, 310, 1 *Ves. & Bea.* 79.

(39) See the judgment of *Boyle v. The Bishop of Peterborough*.  
the *Lord Chancellor*, affirming

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1804.

July 14th,  
16th.

## PERRY v. PHELIPS.

A final decree, upon a sum ascertained, is equal to a judgment: but a mere decree for an account of the Plaintiff's demand, and of the personal estate come to the hands of the Defendant, with a mere direction for payment out of the result of that account, does not prevent the executor paying a judgment.


THE Plaintiffs claimed under a general devise and bequest, by the Will of *Joseph Tolson Lockyer* to his wife, the Plaintiff *Maria Perry*, and under the Will of *John Lockyer*, the elder; which Wills are stated in the former reports of this cause (40).

By a decree, made in 1795, accounts were directed of the personal estate of *Samuel Smith*, one of the executors of *Thomas Lockyer*, and of the personal estate of *Thomas Lockyer*, come to the hands of *Mary Smith*, his administratrix *de bonis non*.

By another decree, made on the 31st of *July*, 1798, the cause coming on for farther directions, the Master was directed to carry on the account of the personal estate of *Thomas Lockyer*, received by the Defendant *Mary Smith*, or any other person by her order, or for her use. An account was directed of the personal estate of *Thomas Lockyer*, came to the hands of the late Defendant *Samuel Smith*, &c.; and it was ordered, that what should be found due upon that account should be answered by the Defendant *Thomas Smith*, his executor,  
out

(40) Ante, Vol. IV, 108. I, 251.

out of *Samuel Smith's* personal estate, which had come to the hands of *Thomas Smith, &c.* with liberty to state any matter specially; and that the Master should carry on the account of the personal estate of *Samuel Smith*, received by *Thomas Smith, &c.* reserving farther directions,

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The Master's Report stated, that *Samuel Smith* was at his death indebted to *Lockyer's* estate to a greater amount than the whole of *Samuel Smith's* personal estate; and there was due from his executor *Thomas Smith*, on account of *Samuel Smith's* personal estate, a final balance of 3022*l.* 15*s.* 9*d.*

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Exceptions were taken by the Defendant *Mary Smith* to the Master's Report for disallowing payments by her, as executrix of her late husband *Thomas Smith*, amounting to 1547*l.* 18*s.* 2*d.*

Mr. *Romilly* and Mr. *Leach*, in support of the Exceptions.

This case cannot be distinguished from *Smith v. Eyles* (41). Upon that authority the decree, directing an account of the personal estate of *Lockyer*, come to the hands of *Samuel Smith*, cannot amount to a judgment. Neither can it upon principle; for the preference of a judgment creditor is upon the ground, that the debt is ascertained. But a decree to account ascertains no debt.

Mr. *Richards* and Mr. *Hall*, for the Report.

Generally, a decree to account does not give a preference. But this is a decree for payment. The decree of 1798 directs, that *Thomas Smith* shall answer out of the estate

(41) 2 *Atk.* 385.

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[* 36]

estate of *Samuel Smith*, possessed by *Thomas*, what *Samuel* had possessed of *Lockyer's* personal estate. That is a positive decree for payment of something in all events. There have been various decisions, that a decree is equal to a judgment. *Morice v. The Bank of England* (42) is the great case upon this subject; and is the specific case now before your Lordship. Some demands were unascertained; depending upon accounts; and yet the decree gave a preference over a subsequent judgment. *The distinction is, where there are mutual demands; and it is uncertain on which side the balance will turn; and that appears to have been the nature of the decree in *Smith v. Eyles*; a mere decree for an account, debtor and creditor, upon the transactions between them; and it was uncertain, how the balance might be. That case therefore has no resemblance to this; in which the balance is all on one side; and though the demand is not absolutely ascertained, it is ascertained, who is debtor, and who creditor. In the late case of *Jones v. Jukes* (43) it was held, that an administratrix cannot be allowed payments made after a decree to account. As to the effect of filing the bill, there are cases both ways: some holding, that the appearance makes the Defendants amenable to the Court, and the jurisdiction attaches; so that they shall not make payments different from what that Court would direct.

Mr. Romilly, in Reply.

In *Smith v. Eyles* Lord Hardwicke supposes the case now before the Court. This decree is not, that, when the balance is ascertained, *Thomas Smith* shall pay: it is merely

(42) *For.* 217. 3 *P. Will.* *Gilpin v. Lady Southampton*,
 402, n. 4 *Bro. P. C.* 287. post, XVIII, 469; and the

(43) Ante, Vol. II, 518. cases collected in the note,
 See *Rush v. Higgs*, IV, 638. 1 *Sch. & Lef.* 299.
Paxton v. Douglas, VIII, 520.

merely a declaration, that he is bound to answer what came to the hands of *Samuel Smith* out of *Samuel Smith's* assets; directing an account, and reserving farther directions. That therefore is not a decree, upon which, as soon as the Report was made, a writ of execution could be taken out, without coming to the Court for a final decree. The whole turns upon that. Lord *Hardwicke* says (44), " Upon a decree *quod computet*, it does " not pass *in rem judicatam*, till the final decree." The common course of a decree for an account against an executor is a declaration, that he is bound to answer. * It has never been decided, that after a bill filed the executor cannot pay; except in *Darston v. Lord Orford* (45); which decree was reversed. The only effect of bringing an action, or filing a bill is notice, and the Defendant at law may after the action brought, and before plea pleaded, prefer creditors, but not after plea: the issue being, whether he has fully administered at the time of the plea,

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[*37]

The Lord CHANCELLOR.

The case of *Smith v. Eyles* has been frequently the subject of observation. I will look into some manuscript notes of it. But this decree seems only for an account of the personal estate of *Lockyer*, possessed by *Samuel Smith*; and declaring, that the debt, when ascertained, is to be paid out of the estate of *Samuel Smith*, come to the hands of *Thomas Smith*. Then an account is to be taken of both estates; and, till that account is taken, how can it be said, there is not an account on both sides?

The Lord CHANCELLOR.

The question is, whether the Master has done right in disallowing these payments, regard being had to the effect

July 16th.

(44) 2 *Atk.* 387.


(45) 3 *P. Wms.* 401, n.

1804.
 ~~~~~  
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 v.  
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[ \*38 ]

effect of the decree of *July* 1798. It is extremely clear, that there was for a considerable time a struggle in this Court, before they decided, that decrees of this Court were equal to judgments at law. But that seems to have been very well settled about the time of *Morice v. The Bank of England*; which was decided both in this Court, and in the House of Lords; and has been followed in subsequent cases. That case is remarkably well reported in *Brown's Parliamentary Cases*. Four bills were  
 \* filed by creditors. The first was filed by the daughters of *Morice* against his administratrix; and they stated by the bill the amount of their demands. The circumstances must be particularly attended to, in order to render these causes intelligible. The answer admitted the amount of that demand; and the decrees in that suit and the others against those, who brought the appeals to the House of Lords, were decrees, ordering payment of sums, liquidated by the statement in the bill and the admission of the answer. That was not therefore merely the case of a decree to take an account: at least the principle, upon which it went, particularly in the House of Lords, was, that it was a decree to pay a sum of money, liquidated by the original decree itself. That such was the ground is very clearly to be collected from what is stated in other cases, and the very able reasons given upon the appeal in the House of Lords by the Counsel against the decree; for they take the distinction between a decree *quod computet*, and a final decree; and insist, that the decree appealed from was only a decree *quod computet*; and there seems to have been some reason for it; unless you say, though the whole demand is not ascertained, yet so much as was confessed to be due, ought to be considered as ascertained; and it is remarkable, that the Lords go upon the ground, that it was not a decree *quod computet*; but, finally, they direct a deduction even out of the sums stated in the bill and admitted by the answer; for the  
 decree

decree was taken for the sum stated by the bill, and admitted, without deduction; and the interest was directed to be calculated; and finally the creditors appealing had this variation of the decree; viz. a direction to the Master to see, what allowance should be made out of the demand of the Plaintiffs, the daughters, in respect of their maintenance and expenditure incurred regarding them.

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It is extremely clear from several cases, that the decision of that cause went upon the ground, that the original decree was to be considered final. In *Ferrers v. Shirley*, upon the 15th of *March*, 1738, from a note of Mr. *Brown*, a considerable practitioner in this Court, a judgment subsequent to a decree for an account was preferred; and the circumstance, that there was a report prior to the judgment was not sufficient to give a preference: but upon the Report some decree must be made. An attempt has been made to distinguish *Smith v. Eyles*, by endeavouring to make out from the language of the Report, that there were mutual accounts; and the declaration was for payment of the balance. But upon the Report in *Atkyns* that could not be the case. According to Mr. *Joddrell's* note the principle is, that, if under the bill against the executor I send it to the Master to compute what is due, until the Report, and an order upon that Report to pay, *non transit in rem judicatam* (46). In *Martin v. Martin* (47) it was so understood; attending to the language of Lord *Hardwicke*; that “if the decree is first obtained, the Court will then “restrain; which was the ground of the case of *Morice v. The Bank of England*; for had not the creditor, “who sued in this Court, obtained a decree first, and “the *quantum* of the demand been thereby ascertained, “the

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(46) See *Thompson v. Grant*, (47) 1 *Ves.* 211; see p. 213. 4 *Madd.* 438.

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“ the Court would not have interposed by injunction  
 “ against the other creditors, as it did.”

[ \*40. ]

In *Brooks v. Reynolds* (48) residuary legatees brought a bill to clear the fund, for payment of the creditors, &c. and after a decree an injunction was sought by the executrix against persons suing at law; and it was very strongly contended, and colourably, that, the decree, being upon a bill by residuary legatees, and  
 \* no judgment for any creditor, whose demand was liquidated by such a decree, the principle of the Court did not authorize an injunction. But Lord *Thurlow* in that case, and in *Kenyon v. Worthington* (49), seems to have altered a little the principle, upon which these injunctions went; for originally they were granted upon this ground; that, where a bill was filed by a single creditor, and he proved his debt, and had a final decree, the Court considered that as equal to a judgment; as being bound to maintain its own proceeding; and feeling it necessary to protect the executor in obeying the exigency of that equitable judgment; which could not be made matter of a valid plea at law.

The next class of cases is, where creditors are suing for themselves and all other creditors: they prove their own demand; which may be considered a judgment for that; and in *Douglas v. Clay* (50), Lord *Camden* said, that until decree any creditor may proceed at law; but after the decree this Court considered it as much available to any creditor, and as to all, who came in, as if all had obtained judgment. The contrary was strongly contended in *Brooks v. Reynolds*: but Lord *Thurlow* said, it was quite sufficient to maintain the jurisdiction, that  
 this

(48) 1 *Bro. C. C.* 182.

(50) In Chancery, 21st Feb.

(49) In Chancery, 13th 1767. 1 *Dick.* 293.March, 1785. 2 *Dick.* 668.

this Court had itself taken administration of the assets; and, where once a decree is made, final, or not, (for he puts it so, particularly in *Kenyon v. Worthington*, that it is not necessary it should be final) from the inextricable difficulty to the executor, if this Court calls upon him to administer in this Court, and creditors call upon him to administer out of it, and referring to *Martin v. Martin*, where Lord *Hardwicke* would not permit creditors to proceed after a decree, in all cases, where the Court has itself taken administration of the assets, an injunction ought to go.

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v.  
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[ \*41 ]

But a mere decree for an account of the demand of the Plaintiff, and of the personal estate come to the hands of the Defendant, with a mere direction for payment out of the result of that account, is not a decree to prevent the executors praying a judgment. There must be a report, and a final decree upon it. Upon these grounds therefore these judgments were well paid, as against the original decree; and the exceptions must be allowed.

FINCH v. SQUIRE.

UNDER the decree in this cause for an account of the personal estate of the testator, it appeared by the Master's Report, that part of the personal estate was lent upon security of the poor rates and county rates, for building a gaol, under Acts of Parliament, giving authority to borrow money, and assign the rates, for that purpose.

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1804.  
July 16th.  
Money, secured by assignment of the Poor rates and County rates, is within the statute 9 Geo. II. c. 36.; and therefore cannot pass under a bequest to a Charity.

The testator by his Will, executed in the presence of three witnesses, gave and bequeathed the interest, &c.

of



1804.  
  
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 v.  
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[ \*42 ]

of the residue of his personal estate to his wife for life; and after her decease, he gave the residue of his personal estate to his daughter for life; and if she should depart this life under the age of twenty-five, leaving no lawful issue of her body, he gave and bequeathed all the said residue of his personal estate to the Defendant *Squire*; upon trust, to pay the same to the treasurer for the Society for promoting Christian Knowledge.

The Plaintiffs, the treasurers of that Society, claimed the money secured upon the poor and county rates, as personal estate.

Mr. *Richards* and Mr. *Finch*, for the Plaintiffs; and Mr. *Mitford*, for the *Attorney General*.

The question is, whether the poor rates savour of the realty, so as to be within the Statute (51). These are securities, by way of charge or incumbrance under special Acts of Parliament. The rates, as received from time to time, become security for the money advanced; in the nature of a personal pledge; the interest to be paid from time to time. It is not by fair construction to be considered a security upon land, or within the mischief. The poor rates are only a personal aid, and the county rates only a part of the poor rates. It will be said, this is within the cases, *Howse v. Chapman* (52), *Knapp v. Williams* (53), and *Buckeridge v. Ingram* (54). In the case last mentioned the navigation tolls were made realty by Act of Parliament; and if that had not been so, they would have been realty from their nature. Navigation and turnpike tolls are paid in respect of the passage over the land; and the remedy is by Assize.

There

(51) Stat. 9 Geo. II, c. 36.

(54) Ante, Vol. II, 652;

(52) Ante, Vol. IV, 542.

see the note, 284,

(53) Ante, Vol. IV, 430, n.

There is nothing of that sort in this case; the remedy is a Warrant of Summons, followed by Distress; clearly a personal remedy.

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v.  
SQUIRE.

Mr. *Romilly* and Mr. *Steele*, for the next of Kin.

The disposition of Courts of Justice is to give an extensive construction to this Statute; to comprehend property, that partakes in any way of the nature of real estate. This is not a personal security by any one; but is merely a mortgage of the rates. No person would be liable upon the security. The only resort is to the rates themselves. They are levied under the Statute (55) of *Elizabeth* upon all lands, tenements, tithes, manors, and hereditaments of every description. If there is real property, the circumstance, that they are also to come out of personal property, is not sufficient. It is very difficult to distinguish *Knapp v. Williams* from this case. No land was there to be resorted to. The mortgage did not include the toll-houses; and though Lord *Rosslyn* is represented to have said, an Assize would lie, that opinion is expressed with doubt; and certainly the case was not decided upon that ground. This is in nature of rent issuing out of land. : The remedy is by distress; the mode of recovering all rent-charges. It cannot be said, the poor-rates do not affect land. The course is to estimate the value of the land, tithes, &c., and the party is rated in respect of that: not upon his personal ability.

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Mr. *Richards*, in Reply.

According to the nature of the poor-rates, every man is to be assessed in proportion to his visible property. If he has land, he is rated in proportion to that. But the duty does not issue out of land; though the amount is to be ascertained with reference to the property real and personal.

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 v.
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personal. It is not like rent, merely because the remedy is the same. It is difficult to answer the objection, how these securities are to be made available. No direct remedy is given by any of these Acts. They *give authority to borrow money, and to assign over all or any part of the poor-rates. The Act directs the sum assessed upon the parish to be raised by taxation of every inhabitant; a personal tax. The remedy of distress is given merely as being a speedy remedy.

The MASTER of the ROLLS.

There is no solid distinction between money borrowed upon such a security as this, and money borrowed upon turnpike tolls. It is difficult to shew, that a charity by taking money borrowed upon the latter security takes any interest in land. Those tolls are duties imposed by Act of Parliament upon passengers, in respect of their passage along the road. The right to collect those tolls gives no direct interest in the land itself, though an interest in duties arising in consequence of a passage along or through the land. The poor rates are made payable by those, who are occupiers of lands, tenements, and hereditaments. If a man is not occupier of lands, he pays nothing, unless he has other property: but if he has only land, he pays in respect of that. A very nice distinction was taken for the Plaintiffs, that the public make him contribute as having the land, not on account of the use of the land. That distinction is not very perceptible. In the one case the public calls for the duty on account of the passage along the land, that it may be laid out for the purpose of public advantage, the repair of roads, and facilitating communication: in the other case they actually burthen the lands, by burthening the occupier with the duty, for other public purposes of convenience and advantage. It is true, they are not raised out of the land only: but by far the greatest part is raised out of the land; for the
 the

the land pays so much rent in consequence of the occupier being liable to the poor rates: otherwise the landlord would have more rent. So, all, that is paid * in respect of the land, is got from the land, as much as rent arises out of the land itself. It is more properly to be said to arise out of the land, because it is in respect of the occupation, than the tolls for the mere privilege of passing. As to that part of the poor rates, that is raised out of the personal property, it cannot be distinguished. I cannot divide and apportion the security; that so much is to be imputed to the produce of land; and so much is from personal property. I must take the whole. They are so blended, that it is impossible to distinguish them. If the consequence of their holding this security would be, that something real would go to the charity, it must fail altogether. That is the necessary consequence; for it must be the security, as it stands: that is, such a security as charges the poor rates in the mode and manner, in which they are collected. Therefore these securities cannot pass to the charity.

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v.
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FAIRMAN v. GREEN.

JOSEPH FAIRMAN, by his Will devised all his real estates to his eldest son *Joseph* in fee; and gave 1000*l.* to his executors, in trust for his wife for life, and after her death for her children, share and share alike; and he gave the residue of his personal

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1804.
July 20th.
Maintenance allowed in the case of children and grand-children; though the interests

were contingent, with reference to the case of survivorship; accumulation directed; and no express authority for any application during minority, except for the younger children, surviving the eldest, in the event of his death under twenty-one, without issue.

The Court refused to make the order on Petition; and directed a Bill to be filed.

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v.

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estate to his three younger children, share and share alike, to be paid to them at the ages of 21 or marriage; and he directed, that his wife, so long as she should continue his widow, should receive the rents of his * real estate and the dividends of his children's fortunes during their minorities: and, if she should marry again his executors were directed to apply the rents of said estate and interest of the legacies, or such parts as they should think proper, for maintenance and education; and accumulate what should not be so applied, to increase their fortunes.

The testator died in 1794 leaving his widow and four children, *Joseph, John, Samuel, and Elizabeth*, infants, surviving.

Joseph Fairman, the grandfather of the infants, by his Will, dated the 27th of *November*, 1799, devised all his real estates to his grandson *Joseph*; and empowered his executors to let the estate, and receive the rents during his minority, and lay them out in Government Securities to accumulate, and to pay the same with the accumulation, to his grandson *Joseph* at the age of 21; and if he should die under that age, leaving issue, then to his issue; and if he should die under that age without issue, the testator gave the said rents to his other grand-children *John, Samuel, and Elizabeth*, equally at 21; and the interest to be applied for their respective uses in the mean time. He also gave to his four grand-children 500*l.* each, to be paid at their respective ages of 21; and he gave the residue of his personal estate to his grandson *Joseph*, to be paid him at his age of 21; and he directed his executors to place out the several legacies in Government Securities, to receive and lay out the dividends from time to time in Government Securities for their respective benefits, until the said legacies should become payable; and to be transferred to them

them with their original legacies; and in case of the death of either of the infants under age without leaving lawful issue, the legacy and accumulations of the deceased to go to the survivors equally, share and share alike; and to be paid or transferred to them respectively at the same time with their original shares; and the dividends to be laid out in the mean time as aforesaid; and if any of his said grand-children should die, leaving lawful issue, such issue shall be entitled to the deceased parent's share.

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Joseph Fairman the grandfather, died in 1800. A petition was presented to confirm the Master's Report, approving a proposal for maintenance: but the *Master of the Rolls* directed a bill to be filed. The bill was accordingly filed on behalf of the infant grand-children, *Joseph*, of the age of 16 years, *John* 13, *Samuel* 10, and *Elizabeth* 15; praying, that the funds should be secured; and allowances for maintenance and education according to the Master's Report; and that it may be declared upon the Will of the grandfather, that the interest of the legacies of 500*l.* each, given to the Plaintiffs, and the interest of the residue of his personal estate, given to the eldest son, were applicable to the maintenance of the Plaintiffs during their minorities; and that no accumulation thereof was to take place, till such maintenance had been provided for out of such interest.

The Master's Report stated, that the clear rents of the real estate, devised by the father of the Plaintiff, amounted to 40*l.* a-year; and his personal estate produced 3000*l.* 3 *per cent.* Consolidated Bank Annuities; and the rents of the real estate, devised by the grandfather to the Plaintiff *Joseph*, amounted to 40*l.* a-year; and he stated the amount of the residue of the personal estate, after investing the legacies of 500*l.* above 16,000*l.* Bank Annuities; and that the infants since the death of
 their

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 v.
 GREEN.
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their father had been maintained and educated by their mother; who was still a widow. The Master farther stated, that he approved the proposal for the application of 250*l.* *per annum* from the death of the grandfather for the maintenance and education of the Plaintiff *Joseph*, out of his annual income, upward of 600*l.*; and of 54*l.* *per annum* for the other children; being the amount of the dividend upon their legacies from their father and grandfather, with the accumulation; conceiving, that the intention of the grandfather was, that a proper part of the interest should be first applied for maintenance; and that there should be no accumulation till after maintenance deducted.

Mr. *Benyon* for the Plaintiffs contended, that in the case of a contingent devise and bequest by the father and grandfather, the rents and profits might be applied for the maintenance of a child, otherwise unprovided: and cited *Greenwell v. Greenwell* (56), *Cavendish v. Mercer* (57), and *Fendall v. Nash* (58).

The MASTER of the ROLLS.

Maintenance not allowed out of legacies to children, given over in case of their deaths under twenty-one, without consent of the legatee over.

The Court has not done this, except where all the parties, who were to have maintenance, were equally interested. If there are three children, the property is given to one, and if he dies under 21, then to the others, there is an equal chance of all attaining the age of 21. But if there is any legatee over, the Court has always taken the consent of that legatee.

Mr. *Benyon* observed, that in this case there is no legatee over.

The

- (56) Ante, Vol. V, 194. These cases have been much
 (57) Ante, Vol. V, 195, n. disapproved by Lord *Eldon*:
 (58) Ante, Vol. V, 197, n. See the note, ante, Vol. III,
Collins v. Blackburn, IX, 470. 12.

The MASTER of the ROLLS.

If the eldest son was to die, the younger children would have maintenance under the grandfather's will. Therefore they are not all equal here, as in the cases cited. My doubt was, whether it was ever done upon a petition, if the infant had not the absolute interest. It could be only upon this equitable ground; that, if the Court would not interfere, the other children would be just in as bad a situation.

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GREEN.

Make the Order (59).

(59) Maintenance allowed; though the interest to accumulate, until the legatee attains twenty-one. *Stretch v. Watkins*, 1 Madd. 253.

CARLOS v. BROOK.

1804.

July 23d.

A MOTION was made by the Plaintiff to suppress depositions, taken after publication, to the credit of a witness.

Examination after publication confined to general credit, and to facts not material to what is in issue in the cause.

Mr. *Alexander* and Mr. *Romilly*, for the Plaintiff, cited *Purcell v. M'Namara* (60).

Mr. *Richards* and Mr. *Owen*, for the Defendant, opposed the Motion.

The Lord CHANCELLOR.

I think, my opinion in *Purcell v. M'Namara* was right. My opinion was this; that the Court, attending with great caution to an application to permit any witness to be examined after publication, has held, where the proposition was to examine a witness to credit, that the exami-

(60) Ante, Vol. VIII, 324. *Wood v. Hammerton*, IX, 145. See the note, VIII, 327.

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CARLOS
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Not competent even at law upon an examination to the credit of a witness to ask the ground of the opinion. The general question only is permitted; Whether he is to be believed on his oath.

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examination is either to be confined to general credit; that is, by producing witnesses to swear, that person is not to be believed upon his oath; or, if you find him swearing to a matter, not in issue in the cause, and therefore not thought material to the merits, in that case, as the witness is not produced to vary the case in evidence by testimony, that relates to matters in issue, but is to speak only to the truth or want of veracity, with which a witness had spoken to a fact, not in issue, there is no danger in permitting him to state, that such fact, not put in issue, is false; and, for the purpose of discrediting a witness, the Court has not considered itself at liberty to sanction such a proceeding as an examination, to destroy the credit of another witness, who had deposed only to points put in issue. In *Purcell v. M'Namara* it was agreed, that after publication it was competent to examine any witness to the point, whether he would believe that man upon his oath. It is not competent even at law to ask the ground of that opinion: but the general question only is permitted. In *Purcell v. M'Namara* the witness went into the history of his whole life; and as to his solvency, &c. It was not at all put in issue, whether he had been insolvent, or had compounded with his creditors: but, having sworn the contrary, they proved by witnesses, that he, who had sworn to a matter not in issue, had sworn falsely in that fact; and that he had been insolvent and had compounded with his creditors; and it would be lamentable, if the Court could not find means of getting at it; for he could not be indicted for perjury, though swearing falsely: the fact not being material. The rule is, that in general cases the cause is heard upon evidence given before publication; but that you may examine after publication; provided you examine to credit only; and do not go to matters in issue in the cause, or in contradiction of them, under pretence of examining to credit only.

These depositions appear to me material to what is in issue in the cause; and therefore must be suppressed.

CURRIE, *Ex parte*.

1804.

July 28th.

THE Petition, presented by *Hugh Currie*, a bankrupt, stated, that a joint Commission of Bankruptcy had issued against him and his late partners *James Currie* and *John Cooke*; to which Commission the petitioner and *James Currie* appeared; and finished their examination; and the Commissioners certified, that they had conformed; and four-fifths in number and value of the creditors signed the certificate; and that *James Currie* died without having made the usual affidavit of conformity. The prayer of the petition was, that it may be ordered, that the said joint certificate may be inserted in the *Gazette*, as the separate certificate of the petitioner; and may be allowed.

Joint Certificate in bankruptcy allowed as the separate Certificate of the survivor.

The Order was, that the said joint certificate be inserted in the *Gazette*, as the separate certificate of the petitioner; and that the same be allowed and confirmed, if no cause shall be shewn to the contrary, as the separate certificate of the petitioner (61).

(61) *Ex parte Cossart*, 1 *Glyn & Jam.* 248.

1804.

July 26th,
27th, 28th.

Jurisdiction of
the Court of
Chancery, re-
presenting the
King, as *Pa-*
rens Patriæ,

to control the
right of a
father to the
possession of
his child
under circum-
stances.

Order, re-
straining him
from removing
the child, or
doing any act
towards, or
for the pur-
pose of, re-
moving it, out
of the juris-
diction.

The Court
would not give
the possession
to the mother,
having with-
drawn from
her husband.

DE MANNEVILLE v. DE MANNEVILLE.

A PETITION was presented on the part of the Plain-
tiffs *Margaret De Manneville* and her daughter
Caroline Thomas De Manneville, an infant of the age of
eleven months, under the following circumstances.

In 1800 a marriage took place between the Plaintiff
Margaret De Manneville, then *Margaret Crompton*, and
the Defendant *Leonard Thomas De Manneville*, a French
émigrant; with whom she became acquainted at *Har-*
rowgate; and by a settlement previous to the marriage
all the real and personal property of Miss *Crompton*,
amounting to 700*l.* a-year, was vested in trustees to
her separate use for life; and, after her death, as to
2000*l.*, in case Mr. *De Manneville* should survive her,
and should have dwelt and cohabited with her until her
decease, upon trust to invest that sum in *English Govern-*
ment security or land; and to pay the interest to him
for life, and the principal after his death among all and
every the child and children of the marriage, as he
should appoint; in default of appointment, equally;
and if but one, to that one; towards his, her, or their,
portions: as to the residue of the trust property, in
case Mr. *De Manneville* should die in the life of his wife,
or should not dwell and cohabit with her, &c. as to the
sum of 2000*l.* to the children, equally: if but one, to that
one: if no children, or all should die under the age of
twenty-one and unmarried, according to the appointment
of Mrs. *De Manneville*, notwithstanding coverture, by
Will; and, in default of appointment, for her mother *Ann*
Crompton, if living; and if she should be dead, and Mr. *De*
Manneville should be living, and should have cohabited
with his wife till her decease, as to one moiety for him,
his executors, &c.; and as to the other moiety, or the
whole,

whole, if Mr. *De Manneville* should be dead, or should not have cohabited, &c. for other persons, of Mrs. *De Manneville*'s family.

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DE MANNEVILLE
v.
DE MANNEVILLE.

The settlement contained a covenant by Mr. *De Manneville*, among other things, that he should not at any time after the marriage by personal compulsion, or legal means, or by any other ways and means whatsoever compel or force his wife contrary to her own free will and inclinations to reside in *France*, or in any other country than *Great Britain*.

The infant petitioner was the only issue of the marriage. Mrs. *De Manneville* was the only child of Mrs. *Crompton*; whose property amounted to 500*l.* a-year. Differences arose between Mr. and Mrs. *De Manneville*; and soon after the birth of the child she withdrew from his house at *Bolton* in *Lancashire*, with her child, to the house of a friend of her mother's, near *Bolton*; leaving a note, informing him, where he might see the child: Mrs. *De Manneville* soon afterwards being advised from the state of her health to send the child to a nurse for a few days, her husband took that opportunity to get possession of it: but, being taken into custody under the Alien Act, two women, who had been sent by the mother, to take care of the child, took it back to her. Mr. *De Manneville* soon after his discharge forcibly took the child away from the house of Mrs. *Crompton*; where Mrs. *De Manneville* then resided.

An application to the Court of King's Bench for a writ of *Habeas Corpus* having failed, the petition was presented in the cause, which had been instituted for the purpose of having the trusts executed and the property secured. The prayer of the petition was, that the Defendant may be ordered to produce the petitioner, the infant,

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VILLE

v.

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VILLE.

infant, in Court; and that the infant may be delivered to the other petitioner, its mother: and in case the Court shall be of opinion, that the infant ought not to be taken from the father, then, that he may be restrained by the Order or Injunction of this Court from carrying away or removing the petitioners, or either of them, out of the jurisdiction; or that the Court will make such other Order, &c.

The affidavits in support of the petition represented, as the cause of Mrs. *De Manneville's* withdrawing from her husband, ill usage, threats to carry her and the child out of the kingdom; and that he pressed her to make a Will in his favor. They also contained charges against him, as being irreligious, and with reference to his political sentiments.

Mr. *Romilly*, Mr. *Fonblanque*, and Mr. *Cooke*, in support of the Petition.

Though there is no express covenant against taking the child out of the kingdom, the covenant as to the mother must virtually extend to children of such a tender age, that they cannot without great danger be separated from the mother. Under these circumstances this child ought either to be restored to the mother; or effectual care should be taken, that the child shall not be carried out of the kingdom: not, according to the prayer of the petition, by a mere Order or Injunction; but by either placing the child with some proper person; or by making the Defendant give security: in the case of an infant the Court doing what is necessary for its benefit, without adhering strictly to the letter of the prayer. There are two grounds: 1st, the danger, that the child may be carried out of the kingdom; 2dly, that the Defendant has no certain means of maintaining the child. The circumstance, that he received the usual allowance from Government to emigrants of his class, amounting

amounting to 60*l.* a-year, is decisive as to his means. Even by the Poor Laws, if the settlements are different, a child cannot be removed from the mother before the age of seven years. The jurisdiction to protect infants is enforced even against the natural claims of the parent. In many instances the Court has taken a child from its parent. *Powell v. Cleaver* (62). *Cruse v. Orby Hunter* (63). In the latter case the Court prevented a father from taking his child abroad with him; stating his purpose to be to educate it abroad. The only ground, upon which a Court of Law can interpose, is some personal outrage. But your Lordship exercises the jurisdiction, belonging to the Sovereign, as *Parens Patriæ*, delegated to the person holding the Great Seal. A Court of Law can only control abuse of power; but cannot appoint any other person in the place of the parent, as a guardian, to exercise power. The leading circumstances, influencing your Lordship's discretion, are the ability of the father to maintain his child, and his disposition to make a right use of his authority. In *Kiffin v. Kiffin*, cited in *The Duke of Beaufort v. Bertie* (64), which has been since followed by Lord *Thurlow* in *Wilcox v. Drake* (65), this Court interfered merely on account of the father's insolvency and character; depriving him of the custody of his child. So the Court will interfere on the ground of religion; to prevent a child from being brought up in a religion different from the established one.

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Mr. *Richards* and Mr. *Bell*, for the Défendant, objected to reading the affidavit of Mrs. *De Manneville*; insisting, that in no instance but a breach of the peace, as upon the writ of *Supplicavit*, can a husband be confined upon the affidavit of his wife; that such affidavit therefore

(62) 2 *Bro. C. C.* 499.

(64) 1 *P. Will.* 702.

(63) In *Chancery*, after *Trinity Term*, 1790.

(65) 2 *Dick.* 631.

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VILLE.

therefore cannot be read upon an application for the writ of *Ne exeat Regno*; as that might be the effect of it: *Sedgwick v. Watkins* (66). *Atwood v. Atwood* (67).

The Lord CHANCELLOR.

Application
by a husband
for the interest
of his wife's
money in
Court refused
on her affidavit
of ill-treat-
ment.

This may be compared to the common case, where affidavits of ill-treatment are read, to prevent the husband's taking the interest of money in Court, the property of the wife; as in the case of *Dr. Douglas*; where the application for that purpose was refused by Lord *Thurlow* upon the wife's affidavit of ill-treatment (68). It is almost of necessity in such a case, that the wife's affidavit should be read; the circumstances generally taking place in no other presence than that of the husband.

No affidavit
necessary to
obtain an
order, that a
child, a Ward
of Court,
shall not be
taken out of
the jurisdic-
tion, even to
Scotland.

But, suppose, the application was only to prevent the child being taken out of the kingdom: could not the wife prove, that the father had said, he would take it? Upon that point, at least, I must hear the affidavit of the wife. No affidavit, however, is necessary to obtain an Order, that the child shall not be taken out of the jurisdiction. If the child, a ward of Court, would not be safe, I would not even let it go to *Scotland* (69).

The affidavit was read *de bene esse*.

Mr. *Richards* and Mr. *Bell*, for the Defendant.

The law is clear, that the custody of a child, of whatever age, belongs to the father, if he chooses.

Upon:

(66) Ante, Vol. I, 49. 3 Bro. *loch*, cited in *Ball v. Montgomery*, ante, Vol. II, 191.
C. C. 11.

(67) *Pre. Ch.* 492.

(69) Ante, *Mountstuart v.*

(68) *Alexander v. M^cCul-* *Mountstuart*, Vol. VI, 363.

Upon that ground the application of the mother to the Court of King's Bench for a *Habeas Corpus* failed. If he maintains the child, and does not neglect it, your Lordship cannot deprive him of the custody; nor interfere with a father, teaching his child that mode of religion, which he thinks best. A husband also has a right to the society of his wife; and if she deserts him, no one is justified in harbouring her or supplying her with necessities. By the law of this country the contract of marriage is not to be dissolved, unless that is absolutely necessary for the safety of one of the parties; as in the instance of an application on account of a breach of the peace, or to the Ecclesiastical Court for cruelty. By complying with the first part of the prayer of this petition, your Lordship will indirectly pronounce a sentence of divorce; delivering over the child for the purpose of keeping it separate from the father; under whose protection the law places it, with full powers; provided they are used for proper purposes. The powers of this Court certainly go to this extent; that the Court will take care, that the parent does not use his authority to the disparagement of the child; as in *Kiffin v. Kiffin*; and, where the child has a fortune, independent of the parent, that it shall have a suitable education; and the prejudices of the parent shall not prevent it: *Ex parte Warner* (70); where the father, being in prison, and therefore, even if he had a fortune, incapable of attending to the education of the child, could not have the possession for any purpose useful to the child. The ground of *Powell v. Cleaver* and *Orby Hunter's Case* does not appear accurately stated. In the latter case they lived separate, probably by mutual consent; and the question was, whether the possession ought to be taken from that person, who had supported, and could support, the

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 DE MANNE-  
 VILLE  
 v.  
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 VILLE

the child. In all the cases in the Court of King's Bench as to the possession of children, the parents have been separated under some peculiar circumstances. But there is no instance, either in that Court or this, of taking the child from the father, willing to receive his wife; not under articles of the peace; and no suit in the Ecclesiastical, or any other, Court. This Defendant, residing here with his Majesty's licence, is not to be treated as an alien enemy: *Wells v. Williams* (71). *Openheimer v. Levi* (72). *Casseres v. Bell* (73).

Jurisdiction to prevent parents preaching irreligious doctrines in the presence of their families.

*The Lord CHANCELLOR* during the argument observed, as to the charge with reference to religion, that this Court had interfered to prevent parents from preaching irreligious doctrines in the presence of their families.

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*The Lord CHANCELLOR.*

In this petition one of the parties is a natural-born subject of this country, possessed of very considerable property, and having a considerable increase in expectation. The other is an alien; but an alien friend; living under the protection of this country. Great jealousy appears in the settlement, from the condition imposed upon the Defendant to cohabit with his wife, and his covenant not to compel her to follow him, if he chose to go to *France*. They seem to have forgot the children in that particular; and it is strange, that they should have forgot that; as the question might have arisen from their differing upon the point of residence, which has arisen under different circumstances, who should have the satisfaction of having the care of the child.

(71) 1 *Lord Raym.* 282.  
*Lut.* 84. 1 *Salk.* 46.

(72) 2 *Str.* 1082.  
 (73) 8 *Term Rep.* 166.

child. The Court of King's Bench, when the child was brought up by *Habeas Corpus*, declined to interfere; and I am not surprised at it; for that Court has not within it by its constitution any of that species of delegated authority, that exists in the King, as *Parens Patriæ*; and resides in this Court, as representing his Majesty. That application therefore failed, and the child was left in the custody of the father.

It has been truly observed, that, the petition being presented upon the part of an infant, the Court will do what is for the benefit of the infant, without regard to the prayer. I do not mean to decide, whether I am at liberty to pay attention to the affidavit of the wife. I do not go into the detail of conduct on either side; as I am to attend to the dispute no farther than as it is material to the prayer, that the Defendant may be restrained from taking his wife out of the jurisdiction; and as it regards the interests of the infant. But I am much struck with the case, as it has been represented: on the one hand, a mother and wife struggling to compel a lasting separation: on the other, a husband, endeavouring by what is called cruelty and ill usage, which undoubtedly may be most aggravated, though no blow is struck, to possess himself through the wife's act of the property, which the parties to this settlement have been extremely careful to withdraw from his reach. The Court is under great difficulty, considering, whether the conduct of either husband or wife is such as will justify actual separation: which exists in proof before the Court; for the contract is indissoluble in a stricter sense than has been stated. It can be dissolved only by Act of the Legislature; with the exception of a separation *a vinculo Matrimonii* by the Ecclesiastical Court for certain causes: but there is no jurisdiction for separation *a vinculo Matrimonii* for such causes as these; and I cannot judge, whether

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v.  
DE MANNEVILLE.

The Court of King's Bench has not any of the delegated authority, as to infants, existing in the King, as *Parens Patriæ*, and residing in the Court of Chancery, as representing the King.

The Court will act for the benefit of an infant, without regard to the prayer of the petition.

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VILLEv.  
DE MANNE-  
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whether the circumstances in proof would be sufficient to justify a sentence of separation *à mensd et thoro* by the Ecclesiastical Court. I have no authority to deliver to the Defendant the person of his wife: but he may institute a suit for restoration of conjugal rights; and, if there has been ill usage, that will justify her retiring from his residence. Her remedy is, not in this *Forum*, but in the Ecclesiastical Court, to which she may resort for that separation, which those Courts alone are by the law and policy of this country entrusted to establish. I must consider the wife at present as living under circumstances, under which the law will not permit her to live. A very material consideration then arises, whether the child is to be removed to the custody of the mother, not living with the father, according to the obligation of the marriage contract; which I am bound to consider subsisting, until I am told by better authority than affidavits, that it ought no longer to subsist. This is an application by a married woman, living in a state of actual, unauthorized, separation, to continue, as far as the removal of the child will have an influence to continue, that separation, which I must say is not permitted by law.

With these views I have looked at the conduct of the husband and wife, so far as regards themselves; for, however relevant, if he had sued out a writ of *Habeas Corpus* to the Court of King's Bench, to have his wife restored to him, or in the Ecclesiastical Court upon a suit by either of them, these circumstances have no relevancy here, except with reference to the consideration, how far it is fit, that the infant should be left in the possession of the parents, or either of them, under such circumstances. Any relief as to the wife arises only out of the covenant. But there is no jurisdiction here to relieve her from ill usage. As to the political  
and

and religious principles of this gentleman, there is but an unsatisfactory account upon those topics by the affidavits; if my consideration ought to be called to them. But the view, that I take of those affidavits, is, as they create more or less probability, that he may be removed from this country; and, therefore, that the child may be removed; if it is to follow his person. His religious principles I look at certainly in rather a larger view; considering them in some degree connected with his political principles; for though I think it very improper, that magistrates should make use of an act of State, enabling the Government to send aliens out of the kingdom, as an instrument in family disputes, it is impossible to deny, that the religious principles of men have a very strong connection with their political principles, and lead to acts, against which these laws as to aliens were directly levelled; and an attempt has been seldom made for the destruction of a country by propagating *Jacobinical* Principles, (a term, which, I agree with Mr. *Romilly*, has been frequently applied to principles, to which it is not applicable), that has not been preceded by an attempt to root out those religious principles, which are perhaps the best guard of sound political principles.

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 DE MANNE-  
 VILLE  
 v.  
 DE MANNE-  
 VILLE.

If a clear, distinct, case was made, of an alien coming here, living under the protection of the State, and using his residence here for the purpose of propagating principles so detestable as those, of which these affidavits speak, that may very properly call the attention of those, who are to execute the Alien Act. But I must look at it only with reference to the probability of the infant's being removed, or left in this country; attending also to the way, in which the child should be brought up. Since I have sat here, I removed a child from its father upon considerations such as these. The father was a person in constant habits of drunkenness and blas-

Jurisdiction  
 to remove a  
 phemy, child from its

father, in constant habits of drunkenness and blasphemy, poisoning the infant's mind.

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phemy, poisoning the mind of the infant; and I thought it not inconsistent with a due attention to parental authority, so abused, to call in the authority of the King, as *Patres Patriæ*. In this case the Defendant was ill-advised as to the mode of taking away the child. A man has a right to the custody of the person of his wife; in general also to that of his child; but he must not pursue a legal object by illegal means; as by force of arms, or a conspiracy to do it by force of arms; and though the object is most legitimate, he may become very criminal by the means used to attain it. But I can look to all these circumstances only as relating to the simple consideration, what is fit to be done with the person of the child. I am not to consider, whether the Defendant is an alien, who ought to be left in this country; and must dismiss this strong testimony in his favour, as a peaceable man, except as it attaches upon the future fate of the infant. Neither can I discuss, what would be the fate of an application by either party to the Ecclesiastical Court, or of an application to the Court of King's Bench, upon a *Habeas Corpus*, to obtain possession of her person. The single question is, whether this Court has jurisdiction against the legal, natural, right of the father to have the custody of the person of his child: the father as an alien born, but living in this country under its protection, at least; if, as it is said, he has not since his marriage received the bounty of Government, and born in a country at this moment in hostility with this country: a circumstance material, as affecting the probability of his return to *France*; and considering what must be the effect of his return, whether with the intention of becoming an enemy of this country, or not, upon the individual character, as bound up in the national character. He is an alien father of a child, a natural-born subject; upon whom, by birth, a duty of allegiance has attached, which it never can cast off in
any

any country. There is no doubt, this child, if grown up, might by the prerogative, issuing the writ of *Ne exeat Regno*, be restrained from leaving the kingdom; not upon the principles, on which that writ is generally applied, but by a more correct application of it; and I conceive also, if the child was grown up, and the father had taken it away, the Crown might by the Great or Privy Seal, call upon it to return; and, if not obeyed, might take its property.

The next consideration is, whither the Court has jurisdiction, in what cases, and to what extent, to control the right of the father, *prima facie*, to the person of the child. In whatever principle that right is founded, it is unquestionably established; and is not disputed. I know, there is a very learned opinion of Mr. *Hargreave* (74) as to the jurisdiction of the Court upon this point; and a very able note by Mr. *Fonblanque* (75) in answer to it; who has stated the principle very correctly; for in *Butler v. Freeman* (76) Lord *Hardwicke* professing not to go upon guardianship, and disclaiming wardship, puts it upon this; that the Court represents the King, as *Parens Patriæ*. That has been followed in many cases; and was clearly the principle of Lord *Thurlow* in *Powell v. Cleaver*, *Cruse v. Hunter*, and *Ex parte Warner*. In the first of those cases it was contended, that the bounty, given to the father, had put him to his election; and he could not, after receiving that legacy, withhold compliance with the condition for the education of his children. That argument could not sustain the jurisdiction. The father, not knowing, that he was making the election, was at full liberty to pay back the

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v.
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Prerogative by writ of *Ne exeat Regno*, to restrain a subject from leaving the Kingdom; and by the Great or Privy Seal to recal a subject abroad; and, if not obeyed, to take his property.

(74) Mr. *Hargreave*'s note,
70. *Ca. Lit.* 89. a.

(75) 2 *Fonb. Tr. Eq.* 224.

(76) *Amb.* 301.

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VILLE

v.

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VILLE.

the money. But Lord *Thurlow*'s opinion went upon this; that the Law imposed a duty upon parents; and in general gives them a credit for ability and inclination to execute it. But that presumption, like all others, would fail in particular instances; and if an instance occurred, in which the father was unable, or unwilling, to execute that duty, and, farther, was actively proceeding against it, of necessity the State must place somewhere a superintending power over those, who cannot take care of themselves; and have not the benefit of that care, which is presumed to be generally effectual. In those cases there was a struggle between the feelings of the father and a due attention to the interests of the child; upon the condition, that his education should be conducted in the manner prescribed; which was the course of maintenance and education the best calculated to promote his happiness in the state, in which that fortune would place him. But Lord *Thurlow* took upon him the jurisdiction on this ground, that he would not suffer the feelings of the parents to have effect against that duty, which upon a tender, just, and legitimate, deliberation the parent owed to the true interests of the child; and his Lordship separated the person of the child from the father; always taking care, that the separation shall not have a greater effect than the case requires; and that the intercourse shall be as frequent and full as the case, requiring the separation, will permit.

Then, if there is a jurisdiction, under what circumstances is it to be exercised? In the situation of this child it is extremely difficult not to interpose; and it is also extremely difficult to say, how the Court is to interpose. Looking at the father's situation, and taking his own representation as to his inclination with regard to this child, upon the affidavits there is a fair suspicion of real danger, that the child may be removed out
of

of this country; and then, according to Lord *Macclesfield's* opinion in the *Shaftesbury Case* (77), the Court must act upon that suspicion. Some method must be taken to secure to the Court, that the person of the child shall remain in this country. As to the specific means, I do not recollect, that the Court has directly gone farther than an Order, restraining a person from removing the child out of its jurisdiction. But the Court may according to its habits and principles find means indirectly of securing that object. It must be considered, what the Court is to do, if the father will, and, if he will not, give security not to remove the child; and, if security can be given, whether the child, regard being had to both claims, is to remain in the custody of the father, or, on account of its very tender age, in that of the mother, or some friend; or, whether the Master shall say, in what manner it should be disposed of. It is clear, the father must be restrained from taking the child out of the country. I must either give the child to the father; when I know what he proposes to do, if it remains with him; or to the mother; to which upon some principles there is great objection: or I must take some middle course; and I shall take care, that the intercourse of both father and mother with the child, as far as is consistent with its happiness, shall be unrestrained.

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VILLE.

An order was immediately pronounced, that the Defendant and all other persons should be restrained from taking the child out of the kingdom; and, on the 2d of *August* the Defendant was ordered to go before the Master, and give security not to take the child out of the kingdom.

Upon

(77) *Eyre v. The Countess of Shaftesbury*, 2 P. Will. 102.
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1804.
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 DE MANNE-  
 VILLE  
 v.  
 DE MANNE-  
 VILLE.

Upon the 19th of *February*, 1805, upon an application by the Defendant to discharge the Order for security, on the ground of his inability to comply with it, and his right to the custody of his child, the *Lord Chancellor* expressed his opinion, that the Order was not sufficiently extensive; and ordered, that the Defendant should neither remove the child, nor do any act towards, or for the purpose of, removing it, out of the jurisdiction (78).

(78) Post, *Whitfield v. Hales*, Vol. XII, 492. *Duke of Beaufort v. Bertie*, 1 *P. Will.* 704. *Potts v. Norton*, 2 *P. Will.* 109, n. *Ex parte Hopkins*, 3 *P. Will.* 152. *Butler v. Freeman*, *Blake v. Leigh*, *Amb.* 301, 303. *Wilcox v. Drake*, 2 *Dick.* 631: corrected by the Reg. B. 1 *Jac.* 250, n. *Powell v. Cleaver*, 2 *Bro. C. C.* 499. *Creuze v. Hunter*, 2 *Bro. C. C.* Mr. Bell's note. 2 *Cox*, 242. 1 *Jac.* 250, n. *Ex parte Warner*, 4 *Bro. C. C.* 101. *Ex parte The Earl of Westmeath*, *Anonymous*, *Shelley v. Westbrook*, 1 *Jac.* 250, 264, 266, n. *Lyons v. Blenkins*, 1 *Jac.* 245, and the cases added in the notes. *Wellesley v. The Duke of Beaufort*, 1 *Russ.* (not yet published.)

ROLLS.  
 1804.  
*July 30th.*  
 Land-tax,  
 quit-rent, &c.  
 not apportion-  
 ed as between  
 tenant for life  
 and the re-  
 mainder.

### SUTTON v. CHAPLIN.

UPON the accounts of the Receiver in this cause a point was made, whether, the tenant for life having died in the middle of the year, the land-tax, quit-rents, and other charges, should be borne entirely by the estate of his son, the infant remainder-man in tail; having actually become due after the death of the tenant for life; or, whether there should be an apportionment.

Mr. *Steele*, for the Receiver, contended, that the estate of the infant must bear those charges, which became actually due since the commencement of the estate.

Mr.

Mr. *Trower*, for the Infant tenant in tail, objected, that these charges ought not to depend upon the accident, that they became due before or after the death of the tenant for life; that quit-rent and the land-tax are due *de die in diem*; and capable of being apportioned; and therefore the account should be taken by an equitable construction of the Statute (79). Suppose, the tenant for life should live till the day before the land-tax became payable, is he to take the whole profit, and the remainder to bear the burthen?

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SUTTON  
v.  
CHAPLIN.

[ \* 67 ]

*The MASTER of the ROLLS.*

The Statute has no application to this case. The argument shews, it might be very reasonable to make such a Statute, as to the apportionment of taxes between the tenant for life and the remainder-man: but the Statute of *Geo. II.* has no reference to that case; giving the tenant for life the benefit only as against the tenant, the under lessee (80).

(79) Stat. 11 *Geo. II.*, c. 19,  
s. 15.

(80) See Mr. *Swanston's*  
observations in the note,  
1 *Swanst.* 349.

At the  
ROLLS,  
*June 21st,*  
1803.


WADMAN v. CALCRAFT.

THE Bill stated, that Plaintiff was lessee of the Defendant for 21 years, from 1791, of lands at *Northfleet*, subject to a proviso, that, if the rent should be unpaid for 21 days, or if the Plaintiff should assign or under-let without consent of the Defendant, it should

Before the  
LORD CHAN-  
CELLOR,  
Upon Appeal,  
*July 30th,*  
1804.

Relief against  
a forfeiture  
under a co-

venant for re-entry for non-payment of rent: Not, where the recovery in ejectment was also upon breach of other covenants.

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 CALCRAFT.

[ \* 68 ]

be lawful for him to re-enter. The Bill farther stated, that an ejectment was brought by the Defendant, who, the Plaintiff in equity having suffered judgment to go by default, sued out a writ of possession; under which he entered upon the premises. The Bill represented, that, when the ejectment was brought, a year's rent was due; and, that in *June* 1801 the Plaintiff made a tender of the arrears, and demanded possession; and, upon refusal, filed the Bill, praying, that upon payment of the rent and costs the Plaintiff may be relieved from the \* penalty or forfeiture incurred by non-payment of rent, and may be let into possession, &c.

The Defendant by his answer stated, that the lease contained a covenant on the part of the lessee to repair, hedge, ditch, cleanse, fence, &c. and, in general, to occupy in a husband-like manner, and not to do or permit any wilful or negligent waste. The answer further stated, that in *Easter* Term 1801 the Defendant, being unable to procure the arrear of rent for a year and a half, 168*l.*, and being informed, and having reason to believe, that the Plaintiff had agreed to under-let, and had mismanaged and neglected to keep the premises in proper condition, particularly by cleansing the ditches, &c. brought the ejectment; on the ground, that the Plaintiff had broken the covenant, as well by such mismanagement, as aforesaid, as by non-payment of rent; and the Defendant afterwards took possession; and brought an action for the mesne profits, to recover the rent in arrear.

The cause was heard at the *Rolls*; when the lease, being read, appeared to contain a clause of re-entry for the breach of all or any of the covenants. There was contradictory evidence as to breaches of the covenants against mismanagement, waste, &c. The *Master of the Rolls* decreed, that the Defendant should be at liberty to

to bring an ejectment against the Plaintiff for breach of any of the covenants in the lease, except the covenant for payment of rent; reserving farther directions.

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WADMAN  
v.  
CALCRAFT.

*The MASTER of the ROLLS* made the following observations.

The Plaintiff seeks to be relieved against a forfeiture of this lease; which he states to have been incurred \* solely by non-payment of rent; and if that is the ground of this ejectment, there is no doubt equity will relieve against the forfeiture; considering the purpose of the clause of re-entry to be only to secure the payment of rent; and that, when the rent is paid, the end is obtained; and therefore the landlord shall not be permitted to take advantage of the forfeiture. But in this lease are several other covenants; and it seems admitted, that relief is not to be given in equity against a forfeiture, occasioned by the breach of those covenants (81). The declaration in the ejectment, being general, does not disclose the particular ground, upon which it is brought; and the Defendant in that action has not taken the means, which the practice of the Court afforded him, of forcing the Plaintiff to make that disclosure, by calling upon him, or moving the Court, for a particular of the breaches, upon which he meant to rely. The Defendant suffered judgment to go by default; and comes here, admitting, that he has been guilty of a breach by non-payment of rent; but alleging, that he committed no breach of any other covenant. The landlord, the Defendant in equity, asserts in his answer, that other covenants are broken; and the ejectment was brought for that cause, as well as on account of the non-payment of rent; and with regard to the other breaches there is evidence on both sides. If I  
relieve

[ \* 69 ]

(81) See the next page.

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relieve the Plaintiff, I may give him that, to which he is not entitled.

The Defendant appealed from the decree pronounced at the *Rolls*.

Mr. *Romilly* and Mr. *Martin*, for the Plaintiff, in support of the decree.

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Mr. *Lloyd* and Mr. *Benyon*, for the Defendant, objected, that, an ejectment having been tried, the Court would not make the Defendant try another; that the Defendant in that ejectment might according to the usual course have called upon the Plaintiff by a Judge's Order to state the breaches, upon which he meant to go: but instead of that, he let judgment go by default. They observed, that the Defendant, being already in possession, must be nonsuited in an ejectment.

The Lord CHANCELLOR.

This is an ejectment upon the Statute (82); which proceeds upon the idea, that, where an ejectment is brought for non-payment of rent merely, this Court would relieve against the forfeiture. The Statute limiting the period to six months, and giving no relief *in specie*, supposes the previous right of the tenant to relief. The proceeding under the Statute applies only to an ejectment for non-payment of rent; and clearly there can be no relief against the breach of other covenants (83). The ejectment may be also for other causes; and

(82) Stat. 4 Geo. II, c. 28. Lord *Erskine* relieved against

(83) This proposition has been since the subject of great consideration. In *Sanders v. Pope*, post, Vol. XII, 282, the breach of a covenant to repair; holding the relief not confined within the limits, stated by Lord *Alvanley*, ante, Vol.

and the form of the declaration does not disclose for what it is brought: but under the present practice the Defendant may apply by a Judge's Order for a particular of the causes; and though that particular may contain a variety of causes, and precludes the party from going upon any others, it does not impose upon him a necessity, after proving any one breach, in respect of which he may enter, to go on to prove the others. Under the fourth section the tenant might have paid the rent into Court, and have stayed proceedings, unless the landlord objected, that he could recover for other causes; and if he had so suggested, the Court could have made at most only a qualified discontinuance, or perhaps have * refused to proceed at all, considering the case not within the Statute. If the Plaintiff would have been suffered to go on upon the other breaches, the verdict would ascertain, whether there was a recovery, against which the Court could not relieve. The question is, whether the Court will not examine, whether it was also upon the other covenants. The decree is not right in form; for if the

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v.
CALCRAFT.

[*71]

Vol. III, 693, "unavoidable accident, fraud, surprise, or ignorance not wilful," but to be given at discretion even against a wilful breach, where full compensation can be made. That judgment however, followed by *Davis v. West*, Vol. XII, 475, has been much questioned: the relief has not been since extended beyond the case of payment of money: as in the instance of rent; and has been uniformly refused, Baron Wood dissenting; against breach of covenant to repair, to insure,

(a stronger case against the relief, as the breach may be concealed) and not to assign, &c. without license. See post, *Hill v. Barclay*, Vol. XVI, 402. XVIII, 56. *Reynolds v. Pitt*, XIX, 134. *Lovat v. Lord Ranelagh*, 3 Ves. & Bea. 24. *Bracebridge v. Buckley*, 2 Pri. 200. *Rolfe v. Harris*, 2 Pri. 202, n. *White v. Warner*, 2 Mer. 459. Post, Vol. XIII, 228; the note, 79; and the note, 2 Mer. 65, *Hannam v. South London Water Works Company*.

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v.
CALCRAFT.

the Court thought, it stood also upon the other breaches; and meant to examine them, the course ought to have been of a different nature: an issue to try, whether there were any breaches of those covenants, specifying them, that were known to the Defendant previously to the ejectment brought.

An Issue was directed,

ROLLS.

1804.

July 12th,
30th.

SELEY v. WOOD.

Executors
trustees of
the residue
undisposed of,
for the next of
kin by the ef-
fect of expres-
sions in the
Will, import-
ing a trust,
and reversion-
ary legacies
upon [• 72]
the
decease of
two annuit-

ants. Legacies
to the next
of kin do not
exclude them.

Bequest of
annuities for
life: "when
" dead to re-

" turn to the executors:" a legacy to the executors beneficially;
not as trustees.

JOHN ATKINS made his Will, dated the 23d of December, 1796, beginning in the following manner:
" *John Atkins of Blenheim Street Bond Street* a coal dealer of *St. George's parish Hanover Square* do make this my last Will and Testament in the manner after my decease my affairs may be settled by Mr. *Thomas Wood* a coal merchant of *Northumberland Street* and Mr. *David Fay* of *Harrow or Paddington* I appoint executors of this my last Will if they will be so good as to do it. First, I give *Thomas Triming of Battle Bridge* my wife's brother twenty pounds a-year for his life only with all my household goods and wearing apparel and to bury my body."

The testator then in a very inaccurate manner gave several annuities for the lives of the respective annuitants, to be paid quarterly; with directions for the separate use of those, who were married women. Among those he gave to *Sarah Duke* 20l. a-year for her own use, and not for her husband to do any thing with it as long

long as she may live; "when dead to return to the "executors." The last annuity was to *Ann Cole*, 20*l.* a-year for her life, not to be at the disposal of any husband, or any other body; "when dead to return to "executors." Some of the other annuities were made determinable upon any offer to sell or pawn them; which direction was thus expressed, as to one; "to be forfeited:" as to another, "to be lost to them;" and as to a third, "then it may be lawful to stop it."

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SELEY
v.
WOOD.

The testator died in 1799. The bill was filed by the annuitants against *Wood* and *Fay*, praying, that the accounts may be taken: and, that it may be declared, that the Defendants are possessed of the residue in trust for the Plaintiffs *Elizabeth Seley* and *Hannah Cole*, as the next of kin of the testator, being his sisters.

The Defendants claimed the residue for their own benefit.

Mr. *Romilly*, for the Plaintiffs.

The words of request, added to the appointment of executors, "if they will be so good as to do it," exclude the Defendants from the residue; which amounts to 6000*l.*, the bulk of the testator's property: only small legacies and annuities being disposed of. He could not mean, [that they should take that beneficially by the *appointment of them as executors. The rule is perfectly settled, that an intention to create a trust is sufficient.

[*73]

Mr. *Richards* and Mr. *Ainge*, for the Defendants.

There is not sufficient indication upon this Will of an intention to exclude the Defendants from the legal consequence of their appointment as executors. The particular expression, that has been pointed out, is very slight; amounting to nothing more than that he appoints them

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 ~~~  
 SELEY  
 v.  
 WOOD.

them executors, if they choose to act; mere terms of civility. After giving some of the annuities he adds the words, "when dead to return to the executors;" which seems to import a gift to them.

*Mr. Romilly, in Reply.*

From a great number of annuities two only are selected; which upon the death of the annuitant are to return to the executors, as expressed in this most inaccurate Will. If the word was "go," instead of shewing, that the executors were to take the residue, it would import the contrary. Expressing that as to two annuities only, he cannot be construed to have the same intention as to the rest. As to the other words, the expression imports an obligation upon him; not, according to the Defendants' construction, a great kindness conferred upon them. It is not clear, that a reversionary interest will not make an executor a trustee.

*The MASTER of the ROLLS.*

All these cases turn entirely upon the intention. The question is, whether the intention to give an office can be sufficiently collected. I do not see, why a reversionary interest should be an exception. Is it not as much a legacy as a direct and immediate bequest? The argument always is, what can the testator mean by giving the executor particularly what he means him to have in the general residue: why give him any thing, if he would take the whole? Upon that point I wish to see, whether that is such a legacy as would turn an executor into a trustee. Considering the wording of this Will, great stress is not to be laid upon it.

[ \*74 ]

*July 30th.*

*The MASTER of the ROLLS.*

My opinion upon this Will is, that the executors are to be considered trustees of the residue for the next of kin,

kin. The words, by which the executors are appointed, strongly indicate an intention to impose a burthen, not to confer a benefit: to give them the office of executors, and not a beneficial interest in the estate. These words are very like those, that occur in *Lord North v. Purdon* (84): “heartily requesting them to be so kind as to take on them the execution of the Will.” The decision of that case certainly did not turn necessarily upon those words; for an intention appeared to dispose of the residue to some person; a blank being left: but I mention the case on account of what Sir *John Strange* mentions with regard to the words; evidently shewing, the testatrix did not mean the blank to be filled up with the names of the executors. “When she mentions her executors by name, and only as such, in the following sentence, she plainly intended them no farther favour; and there are added pathetic, supplicatory, words, addressed to her executors, to take on them the execution and burthen of her Will; which words she could not be supposed to have used, had she intended them so great a benefit as the residue of her estate, if *Mary* died before twenty-one or marriage.”

1804.


SELEY  
v.  
WOOD.

So he held, the words plainly shew an intention, that they should not take the surplus. It is clear, the legacy to the next of kin, which occurs in this case also, does not exclude them. Notwithstanding two decisions to the contrary, one by Lord *King*, it is now settled, that it does not.

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This Will consists almost entirely of annuities to different persons. The only words applicable are those at the end of the bequest of one of those annuities; “when dead to return to the executors;” and then, after an annuity, immediately following, another has the same clause. Those words are relied upon on both sides:  
for

(84) 2 Ves. 495.

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 SELEY  
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for the executors, to shew, the testator conceived, that when the annuity should expire, the capital would return to the executors of course. But if the testator knew that to be the law, that the consequence of the expiration of the annuity was, that the capital would return to the executors, why should he say so as to these particular annuities. If he did not know that, then there is no inference with regard to his intention from the word "*return*." On the contrary it seems, that having made that declaration in favour of the executors only in two instances, he did not mean, they should take in all the others. The safest course therefore is to follow, as close as I can, the words of this ill-drawn Will; not being at all certain of the intention. If, as to two of these bequests, he has said, the executors should have the money, and has not said so as to the others, I must say, he meant differently as to those. If he meant, they should take in these two instances, then they derive partial benefits under the Will; and upon that ground also are excluded from the residue; for there is no doubt, a reversionary interest; after a life interest would exclude an executor; and more than a direct and immediate legacy, upon the reasoning; for the argument is more strong. The argument from a legacy may be rebutted. There is a motive for it. It is some advantage; putting him on a footing with other legatees; though there should be no residue: so that he shall have something in all events. But, where an interest is given in this manner, that does not apply; for he is sure in all events he will have it, if the testator intended he should; for, when the annuity drops, he must have it; and no other benefit was intended, than the law would give him; if the testator intended, the law should operate in his favour (85).

Perhaps

(85) In *Lynn v. Beaver*, 1 Turn. 63, the Lord Chancellor expresses considerable doubt of the effect, for this purpose, of a reversionary interest; particularly a contingent reversionary interest; as in that instance.

Perhaps it may be contended, that as to these two legacies the executors are trustees; for the gift to them would imply nothing more than that the subject should fall into the residue; and *Lord Bristol v. Hungerford* (86) may afford some countenance to that argument. It was urged for the executors in that case, that by the Will it was expressly said, the surplus should be part of the personal estate, and go to his executors; and therefore it must be understood, he meant it to their own use. The answer to that is, no: those words are intended only to exclude the heir: (it was real estate in that case:) but, the executors being trustees, though taking as executors, they will take as executors, being trustees. But those words apply to the whole fund; and, so construed, had a meaning given to them. But, if I construe these words so, as applied to these two bequests, putting them just upon a footing with all the rest, that would deprive the words “*return to the executors*,” of all meaning: whereas by the other construction I do give a meaning to those words. Therefore they are trustees of the residue except those two sums; and declare, that they are entitled to those two (87).

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- (86) *Pre. Ch.* 81. the references; and the note,  
(87) *Ante, Urquhart v. I, 362. Williams v. Jones,*  
*King, Vol. VII, 225. Sadler post, the next case.*  
*v. Turner, VIII, 617, and*

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One executor having a legacy for his trouble, parol evidence was admitted on behalf of his co-executrix, an infant, to rebut the presumption for the next of kin; and she was held entitled to the residue undisposed of.

## WILLIAMS v. JONES.

**A**NN JONES left the following paper in her own hand-writing; which was proved as her Will.

“September 20th, 1803.—I mean this in case I should die before I have a Will made. To my nephew *John Jones* two hundred pounds. To his sister *Sarah's* children one hundred and fifty pounds. To his brother *Owen Jones* one hundred and fifty. To *Elizabeth Evans* my niece the land at *Tworch*. To her sister *Ann Punter* one hundred and fifty. To Mrs. *Ryder* my husband's niece one hundred and fifty. To Dr. *Thornton* one hundred pounds for his care of Mr. *Jones* and myself. To Mrs. *West* of *Rose Farm* one hundred pounds. To Mr. *Sidebotham's* son *Thomas* ten pounds. To *Mary Hughes* my god-daughter ten pounds. Mrs. *Williams* and Mrs. *Lloyd* of *Rhuaban* twenty pounds a-piece. Mr. *Jones*, chymist at *Ruthin* fifty pounds: the rest of his cousins ten pounds a-piece. Mr. *Williams*, No. 1, *Milbank, Church Street, St. John, Westminster*—My niece *Mary Jones* and Mr. *Williams* to be my executors—Mr. *Williams* is to have twenty pounds for his trouble.”

The testatrix died upon the 23d of *January*, 1804; leaving several nephews and nieces, her next of kin. The Bill was filed by *Williams* against *Mary Jones*, an infant, about the age of 16, the executrix, and a great niece of the testatrix, and against the next of kin, to have the rights of the Plaintiff and Defendants in the residue declared.

The Defendant *Mary Jones* went into parol evidence. Three witnesses proved declarations by the testatrix, that

that she had several relations in *Wales*, whom she had never seen; and in all probability never should: therefore should leave them something to remember her: but it was her intention to send for her niece *Mary* from *Wales*; whom she should consider her own child; and would leave her a handsome fortune; that being informed, that her late husband's watch was claimed under a promise by him, she said, she would keep it, while she lived; that it was always her intention to have left it to her niece *Mary Jones* with what she meant to give her besides. Upon the day of her husband's death she declared her intention to give *Mary Jones* her husband's gold watch; but upon the deponent's advising her to give her own metal watch, and leave her the gold watch, when she died, she accordingly gave *Mary Jones* the metal watch.

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The date of these conversations was not ascertained farther than that one of the witnesses said, the last time he saw the testatrix upon her affairs was a short time before her death; when she spoke of the balance of accounts in the banker's hands, due to her late husband; for which the executors of Lady *Williams Wynne* had in his life-time procured a draft. This, it was said, fixed the time by reference to the death of Lady *Wynne*; which happened about three months before the date of the Will.

Mr. *Richards* and Mr. *Hall*, for the Plaintiff, gave up the point.

Mr. *Wingfield*, for the next of Kin, objected to the admission of evidence.

After the cases of *Clennell v. Lewthwaite* and *Thornton v. Tracey* (88), and many others there referred to, it cannot be

(88) Ante, Vol. II, 465, 644.

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be disputed, that parol evidence may be admitted to rebut the presumption in favor of the next of kin against the legal title of the executor, having a legacy. But, where it appears by express declaration or plain inference, that executors are not intended to take the residue beneficially, they are trustees for the next of kin. *Bennet v. Batchelor* (89). *Starkey v. Brooks* (90). *Mordaunt v. Hussey* (91). A legacy to an executor for care or trouble has been considered as affording such plain inference of the intention as to exclude him from the residue: *Foster v. Mount* (92). *Rachfield v. Careless* (93). *May v. Lewen* (94). *Cordell v. Noden* (95). *White v. Evans* (96).

If evidence could not be received in the case of a sole executor, having a legacy for his trouble, the question is, whether the appointment of two executors, with a legacy for trouble to one, can be distinguished from the case of a sole executor, with a legacy for trouble: so as to let in evidence of the intention in favour of the other, not having any legacy. Executors and administrators are considered as one individual, having a joint and entire interest in the testator's or intestate's effects; which cannot be divided. *Com. Dig.* (97). Upon that principle Lord *Alvanley* in *White v. Evans* decided, that one executor being clearly a trustee, by a legacy for his care, the other must be a trustee also: a case precisely corresponding with this.

Mr.

(89) Ante, Vol. I, 63.

(90) 1 *P. Will.* 390.

(91) Ante, Vol. IV, 117.

(92) 1 *Vern.* 473.

(93) 2 *P. W.* 158. 9 *Mod.* 9.

(94) Stated from the Re-

gister's Book, in Mr. Cox's note, 2 *P. Will.* 159.

(95) 2 *Vern.* 148.

(96) Ante, Vol. IV, 21.

(97) 1 *Com. Dig.* 240, tit. *Administration*, B. 12.

Mr. *Wetherell*, for the Defendant *Mary Jones*.

The case of this Defendant the co-executrix, is perfectly distinct from that of the Plaintiff; and she may therefore read parol evidence on her own behalf; not to let in the executor. Having no legacy, how is she affected by his incapacity? It is very difficult to find reasoning to support the conclusion in *White v. Evans*: but in that case no evidence was offered. Why may not this Defendant shew by evidence, that the inference from the legacy to the Plaintiff does not extend to her? Another argument arises from the infancy of the Defendant. Can it be supposed, that, though being an infant she could not act, she was to be excluded from the benefit; being also a near relation of the testatrix? It is true, in *Rachfield v. Careless*, *Powis, J.* speaks of the reception of evidence with considerable doubt. It was however read: notwithstanding what Lord *Alvanley* says (98). At that period considerable doubt was entertained, whether evidence could be received in any case: but the law is now settled beyond all doubt: particularly in *Clennell v. Lewthwaite*; where Lord *Alvanley* considers the doubts thrown out by *Buller, J.* in *Nourse v. Finch* (99).

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[ \*80 ]

Mr. *Wingfield*, in Reply.

Parol evidence has always been received with great jealousy and hesitation. Lord *Rosslyn* in *Hornsby v. Finch* (100) regretting, that the decisions had led to the admission of evidence, observes, that it consists of conversations for months together, the witnesses collecting more from what they said to the testator, than what was said by him to them: they suggest ideas; and from the result

(98) Ante, Vol. II, 473. (100) Ante, Vol. II, 78;


(99) Ante, Vol. I, 344: see page 80.

*Hornsby v. Finch*, II, 78.

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 [ \*81 ]

result of those and his answers collect, what might have been his intention. If the evidence was read in *Rachfield v. Careless*, it was to be expected from the observations of the Court, that would have been the last attempt to introduce it in a case under such circumstances: a legacy given for care; which was considered as disposing of the question. Lord *Alvanley*, speaking of that case, says (1), "Mr. J. *Powis* rejected the evidence; or laid no stress upon it; because the evidence was to the executor for his care; and he was right; for there was irresistible evidence against the executor; in which case I would not admit it."


This executrix must be identified with her co-executor; and a plain inference of intention, that one should be a trustee, must apply to both; making in law one person. The testatrix might have made the distinction: but it cannot be effected by parol evidence against a direct principle of law.

*The MASTER of the ROLLS.*

This is a new point. It did not arise in *White v. Evans*; for there no evidence was offered. That also was a new case: I say, a new case; not merely a new decision; for I am not aware, that the circumstance, in that case, existed in any former case: viz. one executor having a legacy for care and trouble; and the other having none. The decision was, that the one being clearly a trustee, the other must be so likewise; as there was no principle, upon which one could be considered as having a beneficial interest given to him, and the other, as having a mere office. At the same time I do not know any rule of law, making it impossible so to divide the executorship, and to give to one the office, to the other the benefit. The ordinary doctrine is, that evidence may be read to rebut the presumption, or the equity.

(1) Ante, Vol. II, 473.

equity. The question is, whether in the circumstance, that one has a legacy for his trouble, there is any thing more than a presumption against the other. That it affords a presumption, decisive, if unanswered, is the decision in *White v. Evans*. But is there a rule of law, that, if one executor is a trustee, the other cannot, even with the intention in his favour, have the beneficial interest, attaching upon the executor? What should prevent a testator, appointing two persons executors; meaning one only to have the duty; for which a compensation is given to him? That would have the effect of leaving the other the full benefit of the appointment. If it was absolutely necessary, that both should be included, or both excluded, and there was no alternative, I do not know, that I should not rather elect to let in the evidence of intention for one, though the consequence would be to let in the other to the benefit, than upon the ground of the legacy to one for his care and trouble to exclude the evidence for the other; for, at most, there is but an interference from that legacy, absolutely and entirely to exclude the other: certainly a strong inference: but only an inference; and there is something in the argument, that it might proceed from the particular situation of the co-executor; that it might be intended to give him the legacy for care and trouble, without excluding him from the residue; the other executrix being an infant; who could not take any part of the office. The legacy being given for the *extra* duty, the inference is somewhat weakened even against him. I must therefore hear the evidence: but I shall hear it *de bene esse*; for it may turn out nothing; and then it will be necessary to decide the other question; of considerable importance; being one, that never received a determination. If the evidence is strong, and decisive of the intention, I shall hold, that it must operate at least in favour of the person, in whose favour it is produced;

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and consider afterwards, what effect that will have with reference to the other executor.

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The evidence was read.

For the next of Kin.

This evidence amounts to no more than declarations of a person, making a temporary arrangement of her affairs. Upon the face of this instrument an intention appears to make some other disposition, if she lived; and she lived long enough to have ample time to make any other arrangement. Little reliance is to be placed upon such declarations; some of which were even previous to the date of this paper; and might have been abandoned entirely, or in part, at the time of making it. The language of the witnesses is very loose; and they specify no time: so that the period is ascertained only by reference to the death of Lady *Wynne*, mentioned by one of the witnesses. Mr. J. *Buller's* opinion, expressed in *Nourse v. Finch*, was, that the evidence ought to be confined to the time of making the will; and though certainly the decisions have gone to evidence subsequent, I do not know, that evidence antecedent to the will has been the foundation of any decision.

*The MASTER of the ROLLS.*

A strong foundation for the evidence is laid in the circumstance, otherwise very extraordinary, the appointment of a child to be executrix. The intention continues certainly to notice her. She is introduced into the will; for what purpose? A child, to be executrix; and meant to take nothing! A very little evidence in aid of that circumstance is sufficient. It is almost sufficient of itself, without any evidence, to justify the conclusion, Under the circumstances the presumption, which is raised, not from any thing relating to

to herself, but from the legacy to the other executor, does not operate against her.

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The Decree declared that the residue belonged to *Mary Jones* (2).

(2) Ante, *Seley v. Wood*, 71. *Sadler v. Turner*, Vol. VIII, 617, and the references in the notes, 622. I, 362.

MURRAY v. LORD ELIBANK.


1804.  
June 6th.  
July 30th,  
31st.

THE bill was filed by the infant children of Lord *Elibank*; stating the proceedings in the cause, *Lady Elibank v. Montolieu* (3), and the decree, directing the Master to approve a proper settlement, to be made by the Defendant Lord *Elibank* on the Plaintiff Lady *Elibank*, his wife, and her children by him, regard being had to the extent of her fortune and the settlement already made upon her by Lord *Elibank*.

The bill farther stated, that before any report Lady *Elibank* died intestate; and prayed, that it may be declared, that the Plaintiffs and the Defendant *Alexander Murray*, another child of Lord and Lady *Elibank*, have under the Decree of the 19th *February*, 1801, a right to have a provision made for them out of the said one-fourth of the personal estate of Lady *Cranstoun*; and that it may be referred to the Master to approve of a proper settlement to be made by the Defendant Lord *Elibank* upon the Plaintiffs and the Defendant *Alexander Murray*, being all the children; regard being had to the extent of

Right of children to a provision out of the property of their mother under a Decree, directing a settlement by the husband on her and her children; notwithstanding her death before the Report. Demurrer to the bill of the children was over-ruled.

(3) Reported ante, Vol. V, 737. See the references, and the note, II, 609.

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of the fortune of Lady *Elibank*, and the settlement already made by Lord *Elibank*.


To this bill the Defendant *Montolieu* put in a demurrer.

Mr. *Alexander* and Mr. *Cooke*, in support of the Bill.

The question is, whether the children are entitled to sustain a supplemental suit; so as to have the benefit of the decree. This right is purely a creature of the Courts of Equity of this country. Upon principle why should the interest, given by the decree to particular persons, beyond the interest of the parent, depend upon the accident of death? But the interest of the children rests most safely on the uniform practice. In *Rowe v. Jackson* (4) it was said by Mr. *Madocks*, and assented to by the Court, that, where a husband sues for his wife's fortune, and is decreed to make a proposal for a settlement, and the wife dies, the husband shall be compelled to carry it into execution for the children; and he cited a manuscript case for that; and observed, that the same thing was said by Lord *Thurlow* in 1779, upon a motion by Mr. *Mansfield*: but it is otherwise, if the wife dies before the decree. It is now decided, that the creditors of the husband are exactly in the same situation. An order was made by Lord *Alvanley*, enforcing the Equity for the children after the death of the wife, even against the assignment of the husband. It does not appear, whether the husband had carried in a proposal before the death of the wife, or before the assignment: but that cannot make a difference; as the mere proposal could not bind more than the decree, in obedience to which it is made. The rule is now clearly settled,

(4) 2 *Dick.* 604. Stated also from a manuscript note of Mr. *Romilly*.


settled, that the children have through their mother an interest in her fortune. The uniform language of the Court is, that the husband shall go before the Master; and lay proposals for a settlement upon the wife *and children*. It appears from *Hearle v. Greenbank* (5), that Lord *Hardwicke* so considers it; and seems to think, that decree might be made after the death of the wife; the children even after her death having a right against the father for a provision. But here is a decree, establishing this right of the children in the life of the wife; and the settlement is to be considered as made at the date of the decree; and in the nature of an agreement sanctioned by the Court, giving the husband the fortune upon terms. In *Martin v. Mitchell*, the case before Lord *Thurlow* in 1779, the Court after the death of the wife before a settlement carried the proposal into execution against an assignment to a creditor.

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Mr. *Richards* and Mr. *W. Agar*, in support of the Demurrer.

In the case, either of a sum of money, the property of a married woman, which belongs to her husband in her right, or a bond or note, a *chose* in action, or what Lord *Alvanley* called a *chose* in equity, which the husband may recover, but, if he does not, will survive, the debtor may pay the husband; who may release him. It is his property, subject to the contingency of survivorship. A Court of Equity will not assist him; unless he will make a settlement: but, if the wife does not desire a settlement, the Court will not make one for her; and it has been held, that the Court cannot refuse to the wife the power of giving the property to her husband. It is the property of the husband; to be extended to the wife and children, if she thinks fit; but the Court • would not upon her desire in Court permit her to give it

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it to any one else ; as she might, if it was her's, independent of the Equity, the Court attaches upon it. Having not the property, but an Equity only, she has no interest to give up. There is no analogy therefore to the case of a fine ; in which an interest does pass. The trustee is justified in paying the husband : but if the wife had an interest in it, he would be answerable for that to her.

But, supposing the wife to have some interest, can the children have any ? If she is dead, they cannot come here for a settlement : *Scriven v. Tapley* (6). It is said, the Court has by the decree given them an interest. They were not parties before the Court at the time that decree was made. They have no more interest in the property than a stranger ; but are considered by the Court in a manner comprehended in the mother, while she exists ; who is therefore allowed to extend her plan of provision to them ; but not as distinct and separate objects, having an interest independent of her. Suppose, Lady *Elibank* had waived the order for a settlement ; and desired the money to be paid to her husband : the Court, considering the Equity her's, would have held, that she might disappoint her children. The proposal, not completed and carried into execution by the Court, is only an offer ; and if the wife dies, before it is carried into execution, the husband is remitted to his legal right. In all these cases every thing is given with reference to the wife : nothing independent of her. Only two authorities are produced for making any order for the benefit of the issue of the marriage after the death of the wife : the one, *Rowe v. Jackson* ; a very short note ; the other, an order, made by Lord *Alvanley* \* upon petition, by some slip in the absence of the assignees ; who were not parties ; and without even inquiring, whether

[ \* 88 ]

(6) *Amb.* 509. 2 *Eden*, 337.

whether they had any objection to it. The property was very small; which perhaps might have had some influence. The Court cannot say, what proportion the wife would have settled upon herself, and what upon her children. In *Macaulay v. Phillips* (7) it was held, that the decree gave no interest to the husband: but it survived to the wife; and Lord *Alvanley* says, if she died, notwithstanding his proposal he would have been entitled. That opinion was given by Lord *Alvanley* with great deliberation; and takes the distinction between a settlement, approved by the Court, and a mere proposal.

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*The Lord CHANCELLOR.*

There are two points upon this demurrer: one of the form: the other upon the merits. If the wife has this Equity for a provision for herself and her children, up to the moment of the completion it is competent to her to give it to her husband. A great variety of proceedings have occurred, in which the Master has stated, that with reference to the point of settlement the party had waived it; and I apprehend, it will be found, that she may between the period of the order and her death waive the benefit of that order. The question then is, if between the date of the order and her death she does not by some authoritative proceeding express an alteration of her mind, whether that order is to stand for the benefit of the children. The two decisions, that have been mentioned, are strong authorities for that. Let an inquiry be made into the circumstances of those cases; and as to the latter, whether the assignees of the husband were heard, or not.

*Féme coverte*  
may waive her  
equity for a  
settlement out  
of her own  
property, even  
after the  
Order, at any  
time before  
its completion.

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Mr. *Alexander*, for the Plaintiffs, stated the case of *Martin v. Mitchell*, from the Register's Book, in which the

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(7) Ante, Vol. IV, 15; see 19, and the references in the note.



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the motion before Lord *Thurlow* in 1779 was made. In 1777 a decree was made for an account, and that what should be found due to *Hannah Fearn*s should be paid into Court, to her separate account, with the usual direction for a settlement. The sum of 3000*l.* was by the Report stated to be due, and was carried over. After her death, in 1779, the motion, referred to in *Rowe v. Jackson*, to pay that sum to the husband, was made, and refused; and an order was made, directing the husband to go before the Master, and execute the order for a proposal. That proposal was carried into effect by petition at the *Rolls*; and under another order in 1803, stating all the proceedings, the children were paid.

It appears from these cases, that the equity of the wife does survive to the children; and their only mode of availing themselves of this interest is by supplemental Bill. The case of *Macaulay v. Philips* is not applicable. The *dictum* of Lord *Alvanley* would have been inaccurate, if there had been any children: but there were no children. It amounts to no more than that the proposal did not sever the joint tenancy between the husband and wife. If, as your Lordship has observed, the wife can waive her right under the order, for the benefit of her children and herself, that cannot affect a case, where she has not waived it, and is dead.

The Lord CHANCELLOR.

The question is, what is the effect of such an order, as constituting a right in the issue to a provision, if the wife dies without any act done after the date of that order. If this case had been antecedent to the period, when the manuscript case, to which Mr. *Madocks* alluded, was decided, it would have been very difficult, consistently with what the Court does with the wife's property, to say, there was such a right as is now asserted,
 upon

upon a proceeding, that went no farther than an order to lay a proposal before the Master. The husband, where he can, is entitled to lay hold of his wife's property; and this Court will not interfere. Previously to a bill a trustee, who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate, to the husband. Lord *Alvanley* in *Macaulay v. Philips* has laid down, that after a bill filed the trustee cannot exercise his discretion upon that; that the bill makes the Court the trustee, and takes away his right of dealing with the property, as he had it previously. I have heard that otherwise stated in this Court, at the Bar, at least. But that case is the last; and, I think, contains very wholesome doctrine upon that point. I should have supposed, a decree made in the cause proceeded upon the right or equity in the wife at the filing of the bill; for decrees are only declarations of the Court upon the rights of the parties, when they begin to sue. The wife is entitled to call for a declaration, that she then had a right to a provision for herself and her children; and yet it is clear, after such a bill filed she might come into Court, and consent to her husband's having the fund entirely under his dominion. If she does not, the Court, by the decree, orders a proposal to be made for a settlement upon the wife and issue.

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 v.
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ELIBANK.
 Husband,
 where he can,
 may lay hold
 of wife's pro-
 perty; and
 this Court will
 not interfere.
 Previously
 to a bill a
 trustee for a
fême coverte
 may pay her
 personal pro-
 perty, or the
 rents and pro-
 fits of her
 real estate, to
 her husband:
 not after a
 bill filed.

It has been truly observed, that this doctrine is a mere creature of the Court, founded altogether in its practice. The case of *Macaulay v. Philips* proves, what I should have had no doubt upon, that notwithstanding that order for a proposal, if either party died, while it rested merely in proposal, that would not affect the right by survivorship as between the husband and wife.

[*91]

Notwith-
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There Order for a

proposal for a settlement, under the equity of a married woman, by the death of either, while resting in proposal, the right by survivorship, as between the husband and wife, is not affected.

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There were no children in that case certainly. It is not unfrequent, where the Master makes his Report after a decree, for him to state, that the parties had declined to lay a proposal for a settlement before him. That has occurred, since I have sat here: but, when at the Bar, I was frequently concerned in this final arrangement; that, notwithstanding such order by the original decree, upon farther directions the wife came; consenting, that the fund should be taken out of Court; and was permitted to do so. If therefore the issue have a right against the father, it is dependent altogether upon the will of the mother. There is perhaps some difficulty in making all the principles of the Court upon this subject consistent with the notion of such right in the children: but it is not for me to reconcile all these principles, if there is practice sufficient to establish a given course as to that. In *Rowe v. Jackson*, and I can from my own memory confirm both accounts of that case, upon an application, where it was necessary to consider, whether, the wife never having expressed any change of opinion between the period of the order for a proposal and her death, that order gave the children any right, Mr. *Madocks* stated, that it was not according to the practice after that order to permit the husband to avail himself of the death of the wife to take the fund, leaving the children unprovided. His authority, always considerable, is in that instance peculiarly to be regarded; as he referred to another case, in which Lord *Thurlow* was satisfied, that such was the rule; and acted upon it. But it does not rest there; for in a subsequent case it is clear from the Register's Books, that Mr. *Mansfield* after the death of the wife moved, that a sum of money should be paid to the husband, and Lord *Thurlow* *refused that application, upon the ground, that the order for a proposal on behalf of the children was an obstacle. That was followed by what Lord *Alvanley* did, upon a petition; whether regularly or not, will not shake the

the doctrine, considering what had been done before. In that instance Lord *Alvanley* would not deliver out that small sum, little more than 300*l.*, until satisfied, that there was some provision for the children.

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Lord
ELIBANK.

Taking all this together, however numerous the difficulties upon it, it is too much for me to say, upon the argument of a demurrer, all, that has been done in the cases referred to, is to go for nothing, because it is difficult to say *ab ante*, it should be done; and that I am to set up a different course of practice. I agree also with Mr. *Alexander* as to the *dictum* of Lord *Alvanley* in *Macauley v. Philips*; which construction is necessary, to make him consistent; and attention being given to the circumstance, that there were no children, there is no inconsistency in that case. The principle must be, that the wife obtained a judgment for the children, liable to be waived, if she thought proper: otherwise to be left standing for their benefit at her death.

Next, as to the form: if the children have acquired a right by the judgment in the former suit, it is subsequent to the institution of the proceeding in that suit; and unless they can apply by petition, under the liberty to apply, I do not see, how they can, except by supplemental bill.

The demurrer therefore ought to be over-ruled. If upon the hearing of the cause this should turn out to be wrong, it is infinitely better, that it should go to the House of Lords upon a full hearing (8).

(8) A Decree was afterwards made for the Plaintiffs: post, *Murray v. Lord Elibank*, Vol. XIII, 1. XIV, 496. See *Lloyd v. Williams*, 1 Madd. 450. *Steinmetz v. Halthin*, 1 Glyn & Jam. 64.

1804.

Aug. 1st.

Plea of the statute of Limitations by an executor, the testator having died in 1786, though probate was not taken till 1802, allowed: the allegation of the bill upon a fair construction being, that the Defendant had possessed the personal estate, and therefore might have been sued as executor *de son tort*, previously to 1792.

WEBSTER v. WEBSTER.

THE bill stated, that *William Webster* was indebted to *Thomas Webster* in the sum of 19*l.* 10*s.* 10*d.*; and that all the debts of *William Webster*, at the time of his death, except that, were paid. He died in 1786; having by his Will given several legacies; and appointed the Defendant his sole executor, who proved the Will in 1802, and took upon himself the burthen and execution thereof; and possessed himself of all the testator's personal estate and effects; and *Thomas Webster* in his life-time, and the Plaintiff since his decease, severally applied to the Defendant for payment. *Thomas Webster* died in 1792. The Plaintiff was his surviving executor.

The bill then alleging, that the Defendant possessed himself of the testator *William Webster*'s personal estate, as aforesaid, prayed an account and payment of the Plaintiff's debt.

The Defendant put in a plea of the Statute of Limitations.

The Lord CHANCELLOR objected, that as there was no representation till 1802, there was no person who could be sued, and therefore the Statute could not be pleaded (9).

Mr. *Roupell*, in support of the plea, said, that the Defendant was executor *de son tort*, at least; and without probate was executor to all purposes, except bringing an action.

The

(9) *Jolliffe v. Pitt*, 2 *Vern.* 694. 1 *Eq. Ca. Ab.* 305.

The Lord CHANCELLOR admitted, that he might be charged as executor *de son tort*, if it was proved, that he had done any act (10); and thought the plea good upon the circumstances stated in the bill; considering the allegation upon a fair construction to be, that the Defendant had possessed himself of the estate and effects of this testator previously to 1792; and, if so, an action might have been brought at the moment; and consequently not only a cause of action, but an opportunity of suing arose, in 1792.

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WEBSTER
v.
WEBSTER.

The Plea was allowed (11).

(10) This is not to be understood as including acts of necessity or humanity. In a note to *Dyer*, 166, b. a case is noticed of the widow milking cows, as not falling under that description.
(11) *Bea. El. Pl. Eq.* 167.

EVERETT v. BACKHOUSE.

ROLLS.

1804.

June 12th.

Aug. 2d.

IN 1788 *Cooke* and *Kilner* carried on business in *London*, as cotton merchants; and *Cooke* and *Wilkinson* also carried on business in *London*, as merchants. On the 12th of *May* in that year a separate Commission of Bankruptcy issued against *Cooke*. On the 16th of the same month a joint Commission issued against *Cooke* and *Kilner*; and on the 20th a joint Commission issued against *Wilkinson* and *Cooke*. In *November* 1789, *Cooke* obtained his certificate under the separate Commission; which Commission, in *May* 1790, was superseded, as fraudulent.

An uncertificated bankrupt, in general, can acquire property only for the creditors.

Therefore, having entered into a trade, in partnership, the creditors of

The that partner-

ship have no equity against the assignees, for an account and application to their debts of the property used or acquired in that partnership.

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EVERETT

v.

BACKHOUSE.

[*95]

The bill was filed by the assignees of *Doxon*, a bankrupt, claiming as a creditor of the partnership of *Shepherd* and *Cooke*, formed after those Commissions had issued, and carried on under the firm of *Shepherd* and Company; stating, that the capital of that business was obtained by the negotiation of paper; that neither of them advanced any property, that *Doxon* did not know, *that *Cooke* was concerned, till after his dealings with them, and after *Cooke* had obtained his certificate; upon which, when the separate Commission against *Cooke* was superseded, a considerable balance was due to *Doxon*, and there were effects belonging to that partnership of *Shepherd* and Company, acquired in the course of their trade, and debts due to them, specifically bound to the payment of the debts of that partnership; several of which were, soon after the separate Commission was superseded, possessed and received by the assignees under the joint Commissions; and some of the goods, so possessed by the Defendants, were the identical goods of *Doxon*; charging, that *Cooke* at most was to be considered as having carried on the business (if entitled to any benefit from the certificate), in trust for the benefit of his creditors under the joint Commissions; who could be entitled only to the overplus, after satisfaction of the debts of the partnership of *Shepherd* and Company.

The bill prayed an account of the property belonging to the partnership of *Shepherd* and Company, or which had been acquired in the course of the business carried on under that firm, at the time of issuing the supersedeas, possessed or received by the Defendants, the assignees under the joint Commissions; and that they may be declared specifically subject to the debts of the last partnership of *Shepherd* and Company.

The defence, set up by the assignees under the joint Commissions, was, that the separate Commission against
Cooke

Cooke was fraudulent, and was therefore superseded; that the partnership of *Shepherd* and Company was merely fictitious, and the business carried on by *Cooke* alone. *Shepherd* being a low man, in indigent circumstances, put in for a short time by *Cooke* merely as a colour, before he had obtained his certificate; that the capital, upon which that trade was carried on, consisted of the effects, which *Cooke* had withheld from his creditors by means of his separate Commission, and money advanced by his father-in-law, or others, and not of bills negotiated by the partnership. They insisted, that by the supersedeas all the proceedings under the separate Commission became of no effect, as if it had never issued; that the certificate was of no avail, and the joint Commissions remain in full force against *Cooke*.

1804.
EVERETT
v.
BACKHOUSE.

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Mr. *Romilly* and Mr. *Stanley*, for the Plaintiffs, insisted, that the property acquired in the trade, carried on during the bankruptcy, is applicable in the first instance to the creditors, whose debts were incurred during that trade; that an uncertificated bankrupt may have property and trade; if the assignees do not interfere to claim the property: he may bring trover: so he may enter in partnership; and go on, till the assignees interfere: *Chippendale v. Tomlinson* (12). *Webb v. Fox* (13).

Mr. *Piggott* and Mr. *Steele*, for the Defendants, contended, that there was no equity to sustain this bill: these Plaintiffs not being creditors under any Commission of Bankruptcy; and having no specific lien, even taking

(12) 1 *Cooke's Bank. Laws*, 428. See other cases there collected. 8th edit. by Mr. *Roots*, 431.

(13) 7 *Term Rep.* 391.

1804. taking the goods to have been supplied by *Doxon*. The
 ~~~~~ right upon the dissolution of the partnership by the  
 EVERETT *supersedeas* being the right of the individual, not of  
 v. the creditors.  
 BACKHOUSE.

*The MASTER of the ROLLS* stopped the evidence; desiring to be informed, how the objection to the competency of this suit could be answered.

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For the Plaintiffs.

In the case of a separate Commission the creditors of that house may file a bill against the assignees under the Commission and the solvent partner or his representatives, for an account: *Hankey v. Garratt* (14): *La Sabloniere v. Swinton* (15); and other cases. The ground is, that the assignees have an interest; but as trustees for the creditors, with whom the house has dealt, as well as for the creditors under the Commission. Upon that ground in such suits decrees have been pronounced; directing accounts of the partnership transactions, and of the debts, and a distribution of the effects of the partnership among the creditors of the partnership; permitting the other creditors to come in for the residue. This claim is put, not upon lien, but upon this, that the assignees having taken possession of this property, acquired in this partnership, are trustees in the first instance for the creditors of that partnership.

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The evidence was read; for the Plaintiffs, that the house of *Shepherd* and Co. was a regular house of trade; for the Defendants, that *Shepherd* was in very low circumstances, and that *Doxon* was intimate with *Cooke*, and wrote to him about the business.

For

(14) 3 Bro. C. C. 457.  
 Ante, Vol. I, 236.

(15) 1 Cook's Bank. Law,  
 247, margin. 8th edition by  
 Mr. Roots, 270.

For the Defendants.

The cases referred to have no resemblance to this. Those are cases of a separate Commission against one partner. In bankruptcy by a variety of modes the creditors are classed; so as to let each class go against the fund they trusted. Creditors, whose debts were contracted before the Commission, and claiming under it, are in a very different situation from these creditors. This is a new case: property acquired, and debts contracted, after a Commission; and no ground therefore to come into this Court against *Cooke*, either alone, or as partner with *Shepherd*.

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v.  
BACKHOUSE.

[ \*98 ]

*The MASTER of the ROLLS.*

At the hearing of this cause I expressed, and entertained, considerable doubt, whether such a bill as this could be sustained. For the Plaintiffs *Hankey v. Garratt* and *La Sabloniere v. Swinton* were referred to; but upon looking into those cases I find, they proceeded upon a ground, that does not here exist in fact: viz. that there was joint property, out of which the partnership debts ought to be paid, before any part of that property could be appropriated to the debts of the creditors under the separate Commission. But in this instance there is no joint property, out of which the partnership debts of *Shepherd* and *Cooke* can be paid. It seems at first somewhat strange, that, because one of two partners happens to be a bankrupt, the whole of the joint property shall be administered in the same manner as if both were bankrupts. That however is what was done in those cases, and what frequently is done upon petition in bankruptcy (16). It is necessary,

Aug. 2d.

Under a separate Commission of bankruptcy the joint property is administered, as if both partners were bankrupts: viz. in satisfaction of the

(16) 1 *Cooke's Bank. Law*, 247. 8th edit. by Mr. *Roots*, 270. See the note, ante, Vol. I, 239.

joint debts, either by bill or petition: in order to ascertain the surplus, constituting the separate interests.

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 ~ ~  
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 v.  
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[ \*99 ]

in order to carry into effect the principle, adopted in bankruptcy, that the joint property ought first to be applied to the joint debts. The assignees under the separate Commission have some right in the property; the right to all of it; that remains the separate property of the partner, against whom the Commission has issued; subject however to the joint debts, and the \* claims of his partner. It is impossible to ascertain what that surplus will be, without an account of the joint debts, and an application of the joint property to them. The joint creditors are therefore permitted either by bill or by petition to seek that application.

But in this case *Shepherd* was engaged in partnership with a man, who, as it turns out, could acquire no property for himself. *Cooke* was at that time the object of three Commissions of Bankruptcy: one a separate Commission; the other two against partnerships, in which he was engaged. It is clear, being an uncertificated bankrupt, he could acquire property only for the benefit of his creditors under those Commissions, unless indeed under very particular circumstances; where the assignees may by their conduct have precluded themselves from claiming the property, which they have permitted the bankrupt to acquire in the trade, in which he was afterwards engaged; as in *Troughton v. Gitley* (17): but in other cases, without those particular circumstances, it is perfectly clear, the bankrupt either by himself or a partner acquires property, not for himself or his new creditors, but for the assignees under the existing Commissions. *Cooke* obtained his certificate under his separate Commission: but that Commission being superseded, the certificate fell to the ground, just as if it never had existed; and he became liable to all

(17) *Amb.* 630. See post, *Ex parte Martin*, Vol. XV, 114. Ante, *Ex parte Brown*, Vol. II, 67, and the note, 69.

all the consequences of the former Commissions. The assignees under those Commissions laid hold of the property, which apparently belonged to him and his alleged partner *Shepherd*. When the creditors of that partnership come into this Court, they cannot state the proposition, stated in the cases, to which I have referred: viz. that there is joint property, which is in the first place liable to their debts; for there is no such property. The property, so far as it was *Cooke's*, is not liable to their debts, but is the property of the assignees under the existing Commissions. The utmost therefore they could have by this bill would be an account, how much was the property of *Shepherd*. The property, apparently that of *Cooke* and *Shepherd*, would be to be divided according to their respective interests. That is the only relief, that could by possibility be had upon this bill; and that is a species of relief creditors of the solvent partner cannot come here to seek; for in effect it would be a bill filed by creditors of the solvent partner, (solvent, I mean, in this respect, that there is no Commission against him) to have ascertained, how much of the property the assignees and he have at present in common belonging to him; and to have that property applied to their debts. A bill of that description never was sustained. I have stated the ground, upon which it is necessary to allow a bill or petition to apply joint property to the joint debts; though it is a little strange, that the joint property of the solvent partner should be treated, as if he was a bankrupt. But there is no such necessity here; for the partner, who is solvent, may maintain a suit, and ascertain his right; and, when he has obtained his share of the property, there is no purpose, for which this Court should interfere, to administer his property among his creditors: the separate property of the solvent partner. I cannot permit the bill, without laying down, that, wherever a debtor, has property jointly, or in common, the creditors of that debtor may file a bill against the

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v.  
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the person, with whom that property was held jointly, or in common, to ascertain, how much belongs to the debtor; that it may be applied to his debts. That cannot be contended upon any principle; and therefore this bill must be dismissed.

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It is unnecessary to enter into the other question, whether *Shepherd* could be represented as a real partner at all in this transaction. If not, and there is considerable doubt upon it, there is an end of the case upon that ground; for the whole property would belong to the assignees. But it is unnecessary to enter into that; for upon the other ground the bill must be dismissed. At the same time this is a case of hardship upon the creditors dealing with this partnership. For that reason I shall not dismiss the bill with costs.

1804.

Aug. 3d.

The rule, that a trust estate will pass by a general devise, confined by objects, appearing upon the Will, inconsistent with that intention.

MORGAN, *Ex parte*.

**JOHN WILLIAMS**, a mortgagee in fee, by his Will, dated the 25th of *June*, 1794, devised as follows:

“ I give and devise all and singular my messuages,  
 “ tenements, lands, hereditaments, and premises, and  
 “ all my real estate, of what nature, kind, or quality,  
 “ soever, and wheresoever the same are situate and  
 “ being, unto my niece *Ann Williams*, daughter of my  
 “ brother *Edward Williams*, of *Caerleon*, tinman, to  
 “ hold to her, the said *Ann Williams*, her heirs and as-  
 “ signs for ever; subject nevertheless, and charged and  
 “ chargeable with the payment of one clear annuity,  
 “ rent-charge, or sum of 20*l.*, to be issuing out of  
 “ all and singular my said real estates, and payable  
 “ to my said brother *Edward Williams*, by his said  
 “ daughter

“ daughter *Ann Williams*, her heirs and assigns, by  
“ yearly payments, for and during the term of his na-  
“ tural life.”

1804.

MORGAN,  
*Ex parte.*

The testator appointed *Ann Williams* his testatrix;  
and died seised of several freehold estates in *July* 1794;  
leaving his nephew *Charles Williams* his heir at law;  
who by his Will, dated the 30th of *November*, 1795,  
made the following devise:

[ 102 ]

“ I do hereby give, devise, and bequeath, unto my  
“ said trustees *Henry Crump* and *John Wood*, their heirs  
“ and assigns for ever, all such real estates as are now  
“ vested in me, by way of mortgage, the better to enable  
“ them, my said trustees, and the survivor of them, and  
“ the executors and administrators of such survivor, to  
“ recover, get in and receive, the principal monies and  
“ interest, which may be due thereon.”

This testator appointed the trustees executors; and  
died in *October* 1801, leaving his wife pregnant; who  
afterwards was delivered of a son, his heir at law. The  
mortgagor having contracted to sell the premises, an  
inquiry was directed, whether the infant was a trustee  
or mortgagee within the Statute (18). The Master by  
his Report stated his opinion, that the infant was not a  
mortgagee or trustee within the Act; to which Report  
an exception was taken.

Mr. *Romilly* and Mr. *Lewis*, in support of the Excep-  
tion, noticed the fluctuation upon this point, which is  
settled in *Lord Braybroke v. Inskip* (19) in this way; that  
a trust estate will not pass by the general words of a  
devise, if the purpose and object of the testator, ap-  
parent

(18) Stat. 7 Anne, c. 19.

(19) Ante, Vol. VIII, 417;  
see the note, III, 349.

1804.

MORGAN,  
*Ex parte.*

[ \*103 ]

parent upon the Will, are inconsistent with that intention; as in this instance, by the first Will, giving all the estates, charged as to the whole of them with an annuity of 20*l*. As to the second Will, the deviser was merely a trustee for the mortgagee, not the mortgagee himself; and he states the purpose and object of the devise to trustees; that they may recover and get in the principal and interest of the money, due upon the estates, of which he was mortgagee. Clearly his intention was not to devise this estate, which had fallen upon him, probably without his being conscious of it.

*The Lord* CHANCELLOR.

I think, this infant is a trustee within the Statute. The late cases have taken this turn; that, where general words are used, and upon the Will, the testator makes a disposition inconsistent with the disposition of that, which is not his own, you confine the general words. By the first of these Wills every thing is charged with an annual out-going of 20*l*.; which might last longer than the mortgage. From that circumstance there is inconsistency enough to shew, he did not mean to charge this real estate, as real estate; and it is not charged upon his personal estate. Then, as to the other Will, the more reasonable construction is, that the deviser gave his mortgages to these two persons, who are his executors, in order that they might use their title under his Will to get in that money, which by virtue of that Will they were to distribute as executors.

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The Exception was allowed.

ANONYMOUS.

1804.

Aug. 7th.

**A** PETITION, presented in lunacy, prayed, among other things, an allowance to the Committee of the estate for his care and trouble. No allowance to the Committee of a lunatic's estate.

*The Lord CHANCELLOR* said, he did not recollect an instance of allowing a Committee of the estate of a lunatic any thing for his care and trouble; and refused to make the Order. [ 104 ] for his care and trouble.

ANONYMOUS.

1804.

Aug. 7th.

**A** PETITION was presented by the Committee of a lunatic, praying an allowance for repairs made without a previous order; the Master's Report stating, that such repairs were necessary. Repairs made without a previous order, though reported necessary, not allowed to the Committee of a lunatic's estate.

*The Lord CHANCELLOR* refused to make the Order (20).

(20) Post, *Ex parte Marton*, *Ex parte Hilbert*, Vol. XI, 397. See the note, ante, I, 85.

EDWARDS, *Ex parte*.

1804.

Aug. 10th.

**T**HE object of this petition was to supersede a Commission of Bankruptcy for fraud. Commission of bankruptcy not superseded for fraud, where purchases had been made under it.

*Mr. Richards*, for a Purchaser under the Commission, objected, that it would be very mischievous to supersede a Commission, under which purchases had been made; and this was a purchase under an order.

*The Lord CHANCELLOR* said, he did not know an instance of superseding a Commission, where there had been purchasers under it.

No Order was made.



1804.

CHRISTIE, *Ex parte*.

Aug. 11th.

Part-owners of a ship cannot set off their proportions of a debt to the bankrupt on that account against the debts due by the bankrupt to them severally.

THE petitioners were several part-owners of a ship, of which the bankrupt was Master. Upon an account stated between the bankrupt and the petitioners and other part-owners a balance was due to the bankrupt. The petition stated, that the bankrupt was indebted to the petitioners upon the balance of their respective several accounts, distinct from the account relating to the ship; and they proved their said debts under the Commission; and received dividends; and as the sums, so due to the petitioners, exceed the amount of what was due from them to the bankrupt, the petition prayed, that the petitioners may be at liberty to set off their respective proportions of the debt, due to the bankrupt's estate from them and the other part-owners of the ship, against the several separate debts, due to the petitioners by the bankrupt; and that the petitioners may stand as creditors under the Commission for the balance, instead of the sums already proved by them.

Mr. Romilly, in support of the petition, stated the question to be, whether part-owners of a ship are so distinct, that they may be considered separate creditors; and referred to *Ex parte Quintin* (21).

The Lord CHANCELLOR said, unless it could be made out, that part-owners of a ship are not partners (22), this was

(21) Ante, Vol. III, 248; see the note. That case is over-ruled, post, *Ex parte Twogood*, XI, 517. ship are tenants in common, not joint-tenants; the Lord Chancellor on great consideration over-ruling *Doddington*.

(22) In *Ex parte Young*, 2 Ves. & Bea. 242, it was decided, that part-owners of a Lord Chief Justice *Abbott's Treatise* v. *Hallet*, 1 Ves. 496; stated from the Register's Book in

was nothing more than a set-off of a separate debt against a joint debt.

1804.

CHRISTIE,  
*Ex parte.*

The Petition was dismissed.

*Treatise on Shipping*, 99; and in *Mr. Belt's Sup.* 206. Lord *Hardwicke's* judgment, that they were jointly interested, is in opposition to the contract; and that letting the ship to freight was a trade is contradicted by *Ex parte Bowes*, ante, Vol. IV, 168. In the *Attorney General v. Borrodaile*, 1 Pri. 148, where the Court of Exchequer, upon the authority of Lord *Hardwicke's* judgment, held, that letting a ship to freight is a trade, or in the nature of trade, and that the owners of the ship are partners, the case, *Ex parte Young*, does not appear to have been brought to their attention.

TOMKINSON, *Ex parte.*

[ 106 ]

1804.

Aug. 11th.

THIS petition was presented by a bankrupt; praying, that he may be discharged from commitment for not giving satisfactory answers.

Remedy of a bankrupt against commitment by the Commissioners by writ of *Habeas Corpus*; not by petition. The regularity of the commitment was questionable.

Mr. *Romilly*, for the Assignees, consented to the prayer of the petition.

The Lord CHANCELLOR expressed doubt, whether this should be done by petition, or by writ of *Habeas Corpus* (23).

Mr. *Richards* and Mr. *Cullen*, in support of the petition, cited *Ex parte Lingood* (24); and said, the petitioner

(23) Ante, *Taylor's Case*, Vol. VIII, 328. See *Ex parte Hiams*, post, XVIII, 237.  
(24) 1 Atk. 240.

1804.

TOMKINSON,  
*Ex parte.*

tioner appeared by the affidavit to have been delivered by the Commissioners to, and to remain in, the custody of the Messenger.

*The Lord CHANCELLOR* expressed doubt, whether the Order, referred to, was an authority for this petition; observing also, that the Warrant of the Commissioners is for commitment to the County gaol (25); and, if he was not committed, his Lordship had nothing to do with it.

*The Lord CHANCELLOR* some days afterwards refused to make any Order upon the Petition.

(25) Stat. 5 Geo. II, c. 30, s. 16.

[ 107 ]

1804.

Aug. 10th,  
13th.

BEVAN, *Ex parte.*

A joint and separate creditor must elect against which estate to go in the first instance; and, electing to go against the joint estate, he has no preference to the other joint-creditors upon the surplus of the separate estate beyond the separate debts.

A COMMISSION of bankruptcy issued against the partnership of *Hornsby* and *Esdaile*. *Hornsby* had demised to *Dorset* and Co. an estate for 1000 years, to secure the sum of 15,000*l.*, and such further sum as *Hornsby* and *Esdaile* should be indebted to *Dorset* and Co.; and by a bond, of the same date, *Hornsby* and *Esdaile* became jointly and severally bound to *Dorset* and Co. in the sum of 50,000*l.*; to be void upon payment of the sum of 15,000*l.*, &c. By a subsequent deed, reciting, that another partner had been taken by *Dorset* and Co., and that the debt was increased, *Hornsby* and *Esdaile* covenanted, that the said bond should be a security, as if given to the new partnership. By other deeds *Hornsby* appointed certain estates to *Dorset* and Co. in fee, to secure the sum of 15,000*l.*, and all sums to become due, &c.; and another freehold messuage was demised by *Hornsby* and *Esdaile* for 500 years, for the same

same purpose. Another joint security was executed by assignment of a debt and other things; and by another deed they covenanted severally and respectively to pay, &c. *Dorset* and Co. also became bankrupts. They were the only joint and several creditors of *Hornsby* and *Esdaile*; and were admitted to prove against the joint estate under an Order; reserving the consideration, whether they might prove in respect of the joint and several bonds and covenants of *Hornsby* and *Esdaile* against the separate estate of each, of which there was a considerable surplus, until after the separate creditors should have been paid the whole (26).

1804.  
BEVAN,  
*Ex parte.*

The petition was presented by the assignees of *Dorset* and Co.; praying, that, after the separate creditors are paid, the assignees of *Hornsby* and *Esdaile* may pay to the petitioners the surplus of the respective estate and effects of *Hornsby* and *Esdaile*.

[ \* 108 ]

Mr. Romilly and Mr. Cullen, in support of the Petition.

Admitting, upon *Ex parte Rowlandson* (27.) that these petitioners must in the first instance elect between the joint and separate estates, the question is, whether after payment of the separate creditors, having this bond and also these covenants by different instruments, they are not

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|-------------------------------------------|--------------------------------------|
| (26) Ante, Vol. IX, 223.                  | 2 Rose, 36. <i>Ex parte Bigg,</i>    |
| (27) 3 P. Will. 405. <i>Cooke's</i>       | 2 Rose, 37. <i>Ex parte Hus-</i>     |
| <i>Bank. Law</i> , vol. i, 249, 5th ed.   | <i>band</i> , 5 Madd. 419: but where |
| 8th edit. by Mr. Roots, 273.              | the contract is for double se-       |
| <i>Ex parte Blankenhagen</i> , and        | curity against distinct Firms,       |
| other cases, collected by Mr.             | though consisting of the same        |
| <i>Cooke. Ex parte Hay</i> , post,        | individuals, the creditor, if        |
| Vol. XV, 4. <i>Ex parte Lid-</i>          | ignorant of their connection,        |
| <i>dell</i> , 2 Rose, 34. <i>Ex parte</i> | may prove against both.              |
| <i>Adam</i> , 1 Ves. & Bea. 493.          |                                      |

1804.

BEVAN,  
*Ex parte.*

not entitled in preference to the other joint creditors; according to the case, *Ex parte Vaughan*, stated (28) in *Ex parte Rowlandson*. In *Ex parte Bond* (29) Lord *Hardwicke's* opinion seems to be, that the creditor by a joint and several bond was entitled to satisfaction out of the surplus of the separate estate in preference to the other joint creditors. It is reasonable, that a party, who has taken this additional security should have this advantage over the others, who have taken a joint security only. All, yet decided, is, that they shall not come in competition with the separate creditors upon the separate estate.

Mr. *Richards*, against the Petition.

[ \*109 ]

This application is against the principle; though there is no case precisely in point. The rule is perfectly established; that a creditor having a joint and several security, must make his election; and the circumstance, that the security is by distinct instruments, makes no difference. It is reasonable, and agreeable to the equality, alluded to by Lord *Hardwicke* (30), and which the Court aims at in bankruptcy, that such a creditor should not take without letting in the other joint-creditors to participate with him; that class of creditors being prejudiced by his election to participate with them in the first instance.

Mr. *Romilly*, in Reply.

The orders, stated by Lord *Hardwicke*, are more to be relied on than the language attributed to him at the conclusion of his judgment; in which there is not much reason; for if an equal distribution is made against persons, having additional securities, in one sense the effect is inequality.

*The*

(28) 3 *P. Will.* 407.

(30) 1 *Atk.* 100.

(29) 1 *Atk.* 98.

*The Lord* CHANCELLOR.

It is necessary to look to the language of these orders. Several instances of a surplus have occurred; and I do not recollect, that it was ever argued to this extent; that a creditor, having both securities, should be in a better situation. The principle seems obvious; yet in bankruptcy for some reason, not very intelligible, it has been said, the creditor shall not have the benefit of the caution he has used. I never could see, why a creditor, having both a joint and a several security, should not go against both estates. But it is settled, that he must elect. By his election to go against the joint estate the effect to the joint creditors is very different from what it would have been, if he had elected to go against the separate estate; and the question is, whether, if he elects to go against the joint estate, and thereby participates with the joint creditors, that participation, arising from his election, has not in practice been treated as a consideration for the rest of the joint-creditors; entitling them to go along with him upon the separate estate, when he afterwards goes against that estate. It will probably turn out, that in *Sir Stephen Evance's Case* (31), and some others, where there has been a surplus, a practical rule has been laid down. I rather believe, the understanding of the Court has been, that all the joint-creditors go together.

1804.  
BEVAN,  
*Ex parte.*

[ \*110 ]

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*The Lord* CHANCELLOR.

My opinion is, that these joint-creditors have no better claim than the other joint-creditors. The advantage of a joint and separate creditor is no more than that he can elect, whether he will be in the first instance a joint or a separate creditor: but if he has once elected, his fate must be the same as that of all the other joint-creditors.

Aug. 13th.

.1803.

Aug. 17th.

. 1804.

March 27th.

Aug. 13th.

Under the bankruptcy of an executor and trustee, directed by the Will to carry on a trade, and a limited sum to be paid to him by the trustees for that purpose, the general assets beyond that fund not liable.

[\*111]

GARLAND, *Ex parte*.

**HENRY BALLMAN** by his Will, dated the 17th of February, 1798, after directing his debts, &c. to be paid, bequeathed all his leasehold and personal estates to his wife *Margaret Ballman*, and three other persons, their respective executors, &c. upon trust to permit *Margaret Ballman* to receive the rents, interest, &c. for her life, or until she should marry again, for her own use, and the support, maintenance; and education, of his five children, until they should respectively attain the age of 21, subject to certain payments to his children, as after mentioned; and from and after the death and second marriage of his wife in trust for all \*and every or such one or more of his said children or their issue, and in such shares, manner, and form, as she should appoint by any deed or instrument in writing or by her Will; and for want of such appointment, and as to such parts, of which no such appointment should be made, in trust for all his children, their respective executors, &c. equally to be assigned, paid, and transferred, at their respective ages of 21, with survivorship in case of the death of any under that age; and in case of the deaths of all under that age without leaving issue then to pay, &c. his said personal estate to *Margaret Ballman*, her executors, &c.

The testator then directed his trustees to pay to his children respectively, as they should attain twenty-one, 400*l.* a-piece out of his personal estate; and he farther directed, that his trade of a miller and the farming business, then carried on by him, should be carried on by *Margaret Ballman*, until his trustees should think proper to establish his sons or either of them therein; and he directed his trustees upon so settling his sons or either

either of them in the business to permit them to take off the stock, crop, and other effects in the said business at a fair valuation, and to take a bond or note from them for the amount, payable by such instalments as his trustees should think reasonable, with interest in the mean time at 4 *per cent.* He also directed, that, as long as the businesses should be carried on by his wife, the profits thereof should be applied for her own use and for the maintenance and education of his children; and that an inventory and valuation of his stock, crop, and effects, in his said businesses, should be taken within six weeks after his decease; and that any sum or sums, not exceeding 300*l.*, which by a codicil he increased to 600*l.*, should be paid by his trustees to *Margaret Ballman* out of his personal estate for the purpose of enabling her to \* carry on the said businesses; and that she should give notes of hand to the other trustees for the sums so advanced to her and the amount of the valuation. He appointed his widow and the other trustees his executors.

1804.  
GARLAND,  
*Ex parte.*

[ \*112 ]

After the death of the testator *Margaret Ballman* carried on the trades till *December* 1801; when she became a bankrupt. The other trustees had according to the directions of the Will advanced her the sum of 600*l.*; and the stock and effects were valued at 1351*l.* 5*s.*; for which she gave two notes to the other trustees. At the time of her bankruptcy she was indebted to the trustees in respect of those two notes, and also in 768*l.* 12*s.* 4*d.* of the testator's assets, received by her. The surviving trustee proved under the Commission the three sums of 1351*l.* 5*s.*, 600*l.* and 768*l.* 12*s.* 4*d.*

The petition was presented by the assignees under the Commission; praying, that the proof may be expunged; and the dividends refunded; and that it may be declared,



1804.

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GARLAND,  
*Ex parte.*

clared, that the whole of the personal estate of the testator is liable to all the debts contracted by the bankrupt in carrying on the trades of a miller and farmer under the directions of the Will.

When the petition was first heard, two points were made for the assignees: 1st, that the surviving trustee, as a creditor on the notes, ought to be postponed to all the other creditors of the bankrupt: 2dly, that the general assets of the testator were subject to the bankruptcy.

On the first point, *The Lord CHANCELLOR* immediately expressed a clear opinion in favour of the assignees.

[ •113 ]

\* The second his Lordship considered a point of great importance; and directed a farther argument.

*Mr. Alexander* and *Mr. Daniel*, in support of the Petition.

There is no doubt, that a trader, entitled to a share of profits, is liable to all the debts. If an executor is directed to carry on the trade, and does so, he must make himself personally liable to the whole of the debts, contracted in that trade: *Hankey v. Hammock* (32). He must have the right of resorting for his indemnity to the whole

(32) At the *Rolls*, 1786.  
1 *Cooke's Bank. Law*, 67.  
8th edit. by *Mr. Roots*, cited  
as *Hankey v. Hammond*. The  
*Lord Chancellor* cited this  
case from his MS. note; by  
which it appeared, that Lord  
*Kenyon* gave very special di-  
rections, for inquiries as to  
the general debts of the tes-  
tator; the Stock, as it stood  
at his death, and the Stock,

which had been acquired by  
the widow; what debts he  
had in the trade, and other-  
wise; and what debts had  
been contracted in the trade  
since his death; and to dis-  
tinguish the general personal  
estate. *Ex parte Richardson*,  
3 *Madd.* 138. *Buck*, 202. In  
the note, 3 *Madd.* 148, *Han-  
key v. Hammock* is stated  
from the Register's Book.

whole personal estate, given to him with a direction to carry on the trade. It follows, that the creditors must have it, at least by circuit, to the same extent. Upon that ground in bankruptcy arrangements have been made between different classes of creditors; viz. between joint and separate creditors; for they have no lien, except by the effect of an action and execution. Those arrangements are founded entirely upon the equities of the partners between each other. But, if the estate is not liable, the consequence is, the executor is liable, but as having made the contract. The very profits of the trade may escape from the creditors; and yet those profits constitute part of the testator's estate. What is the distinction between those profits and any other part of the estate. There is certainly difficulty in many cases, in the general administration of assets, where the testator directs the trade to be carried on for the benefit of his estate. But that is the necessary consequence of what the testator has thought fit to do; and cannot be a reason for exonerating his estate from that liability, which the law would impose upon him. The difficulty is introduced by himself; and it is not inconvenient in practice. If no part, except what is by his direction employed in the trade would be liable, the executor must undertake all the personal liability, that follows from carrying on the trade, without an opportunity of resorting to the other assets; which upon that supposition may be safely administered. Perhaps executors may shrink from that responsibility, if they have no indemnity; and that would be the inconvenience of a determination in that way. But, suppose the proposition determined the other way: the executor may, if he thinks fit, administer the assets; and pay the legacies; taking the personal responsibility upon himself; as any other executor may; and the inconvenience would not be greater.

1804.

GARLAND,  
*Ex parte.*

[ \*114 ]

1804.

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GARLAND,  
*Ex parte.*

[ \*115 ]

A species of partnership, known upon the Continent; and in writers upon the *French* law, by the term “*En Commandite* (33),” viz. a party bringing in a share, and entitled, and liable, only in respect of that share, certainly does not prevail here (34). The general opinion, that by the law of *England* there cannot be a partial liability in respect of a particular fund, is strong against the rule, upon which the opposition to this petition must rest. No authority is to be found, except that before Lord *Kenyon*. The effect of this Will is a general bequest of all the personal estate to trustees; not a specific legacy to the widow only; with a direction to carry on • the trade. The purposes, for which the trade is to be carried on, are general purposes, of the same nature as those, to which all the personal estate is destined by the former part of the Will: viz. the maintenance of the widow and children, &c.: consequently there is no separation of this trade for any one particular purpose or person.

Mr. *Richards* and Mr. *Toller*, for the surviving Trustee under the Will.

Under the circumstances of this case the testator's general assets are not involved in this bankruptcy. Admitting, that no case, precisely analogous, is to be found, upon principle the assignees cannot substantiate a claim to the general mass of the testator's property. Some propositions are perfectly clear: on the one hand, that, if an executor under the authority of the Will carries on trade with the testator's general assets, not only such general assets, but even his own private property; will

(33) *Société de deux Marchands, dont l'un donne son argent, & l'autre ses soins. Dictionnaire de L'Académie Française.*

(34) In Ireland by Act of Parliament only that part of a trader's property that is registered, is liable.

will be subject to his bankruptcy. It is impossible therefore for a man to carry on trade under more disadvantageous terms, than an executor in the case supposed. If the trade be beneficial, the profits are applicable to the purposes of the Will; and the executor derives no personal benefit from the success of the trade. If, on the contrary, the trade prove a losing concern, the executor, on the failure of the assets, will be personally liable for the loss.

1804.  
GARLAND,  
*Ex parte.*

On the other hand, if an executor without any authority under the Will takes upon himself to trade with the assets, the testator's estate would not be liable in case of his bankruptcy. The parties beneficially entitled under the Will would have a right to prove demands for such of the assets as had been wasted by the executor in the trade, so carried on, in proportion to their respective interests; and with respect to such of the assets, as could be specifically distinguished to be part of the testator's estate, they would not pass by the assignment of the Commissioners: the executor holding them *alieno jure*, they would clearly not be liable to his bankruptcy.

[ • 116 ]

From both these cases the principle may be extracted, on which this case may be decided; that the executor's right to trade with the assets, and their consequent liability to the effect of the bankruptcy, depend altogether upon the nature and extent of the authority conferred upon him by the Will. If he has unlimited power to carry on the trade with the testator's property, the whole of it must be involved in the consequences of his bankruptcy. As it would be benefitted by the success of the trade, it must be liable to all losses, that happen in the course of it. On the other hand, if the executor, not authorized by the Will to trade at all in such his repre-

1804.

GARLAND,  
*Ex parte.*

representative character, do trade with the assets, he is guilty of a breach of trust; and the creditors and legatees shall come in under his Commission; and such of his assets as remain, shall be protected for their benefit.

In order, therefore, to determine, whether the general assets in this case ought to be subject to Mrs. *Ballman's* bankruptcy, it will be necessary to see the extent of the authority, given to her by the Will to trade with the assets; for a testator certainly may qualify the power of his executor to carry on trade; and may limit it to a specific part of his property; which he may sever from the general mass for that purpose.

[ 117 ]

If a testator disposes of the whole of his property by his Will, except, for example, the sum of 5000*l.*, and directs the executor to carry on the trade for the benefit of *J. S.* there would be no pretence, that the assets could in any degree be in danger beyond that extent by the executor's so carrying on the trade, and in the event of his bankruptcy the rest of his property would not be affected by the Commission: otherwise nothing could be more inconvenient than the consequences of such a doctrine. Suppose the bankruptcy of the executor to occur, after the fund has been distributed, and all the legacies paid: are the legacies to be refunded? Is the whole property to be called back? Are the legatees to be harassed with suits, when, perhaps all their legacies have been long ago spent? Or in case of such a will is payment of the legacies to be suspended, and the distribution of the property to be deferred; and if so, for what period; and what is to be the limitation? Such are the difficulties, which must arise from holding, that, where the testator has separated part of his estate from the general mass of his property for the purpose of his executor's trading with it, the whole of his property shall be considered as embarked in the event of the trade.

It

It therefore seems a safer and more convenient rule, as well as more equitable, that the criterion should be, how far the authority, given by the Will to carry on the trade, extends; and to what part of the assets his power is referable. So far, and no farther, shall the assets be held liable to the hazard of such trading. This principle cannot be considered as any infringement of the rights of creditors, or as unduly narrowing their security. If persons, trading with the executor, know him to be an executor, and acting in a representative capacity, they ought to look at the Will, to see, how far his rights extend; and what is the nature of the authority conferred upon him by the testator. If they trade with him without knowing him to be an executor, and conceive themselves to be concerned with him in his own right, they have no reason to complain; his private property being subject to their claims. Therefore it is reasonable, that the liability of the testator's assets to the consequences of the executor's trading shall be regulated by the nature of the authority created by the Will. If that extends over all the assets, all the assets shall be subject: if over part of the assets, then only such part.

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GARLAND,  
*Ex parte.*

[ \* 118 ]

Upon the construction of this Will and Codicil the testator intended to separate 600*l.* from the rest of his property, with the view, that the trade should be carried on by the widow, and that sum only was to be hazarded. The general mass of the property would not have been in any degree benefitted, if the trade had been successful. Mrs. *Ballman* had a right to apply the profits at her discretion; provided she took care of the maintenance and education of the children.

Mr. *Alexander*, in Reply.

Suppose a trade, directed to be carried on by the executor, until one of the younger sons of the testator shall

1804.

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GARLAND,  
*Ex parte.*

[ \* 119 ]

shall attain 21, and then to be delivered up to that son; and that 50,000*l.* is given by the Will to that son; can it be contended, that upon the principle now urged the trade is to be carried on, and yet the executor, incurring all that risk, is not to have recourse to that fund, part of the assets in his hands, and accumulating for the benefit of that legatee: the executor acting in that character by the direction of the testator, not with the consent of the infant? If a specific contract was directed to be carried into execution, and a liability was thereby incurred, could not the executor have recourse to the assets for an indemnity? The only distinction is, that a trade consists of a variety of contracts, instead of a specific one.

*The Lord* CHANCELLOR.

In the case before Lord *Kenyon* the important difficulties, that have been urged upon this occasion, were not submitted to the Court. Certainly Lord *Kenyon* developed the reasons, upon which he drew the conclusion in that case, in a very limited degree, if at all. The question really goes to this; whether this Court is to hold, that, where a testator directs a trade to be carried on, and without limitation, all the other purposes of his Will are to stand still, or all the administration under it to be checked, that every person taking is in effect to become a security in proportion to the property he takes, and to the extent of all time, for the trade which the testator has directed to be carried on. The inconvenience would be intolerable; amounting to this; that every legatee is to hold his legacy upon terms, connected with transactions, by which he cannot benefit, which he cannot control, and which may cut down all his hopes; as far as they are founded upon his receipt of that bounty. On the other hand, the case of the executor is very hard. He becomes liable, as personally responsible, to the extent of all his own property; also,  
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in his person; and as he may be proceeded against, as a bankrupt; though he is but a trustee. But he places himself in that situation by his own choice; judging for himself, whether it is fit and safe to enter into that situation, and contract that sort of responsibility. The creditors of the testator must be either those, whose debts were contracted before his death, or persons, who have become creditors of the trade after his death. If they are creditors of the former description, they have the power and the means of calling forth after the testator's death the whole of his property, in discharge of their demands; and, if they do not put an end to that relation, but permit the representative to act, they have perhaps no more reason to complain of a decision, more limited than that of Lord *Kenyon*, than they would have, if by their own conduct they permitted part of the assets to get to the hands of persons, from whom they could not draw them; and relied upon his liability.

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GARLAND,  
*Ex parte.*

[ • 120 ]

As to creditors, subsequent to the death of the testator, in the first place, they may determine, whether they will be creditors. Next, it is admitted, they have the whole fund, that is embarked in the trade; and in addition they have the personal responsibility of the individual, with whom they deal: the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate, embarked in the trade. They have not a lien upon any thing else: nor have creditors in other cases a lien upon the effects of the person, with whom they deal; though, through the Equity, as to the application of the joint and separate estates to the joint and separate debts respectively, they work out that lien. If it is to be determined upon the convenience, it is not so inconvenient to say, those, who deal with the executor, must take notice, that the testator's responsibility is limited by the authority given to the executor, as to say, on the other hand, that, the executor



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 GARLAND,
Ex parte.

[*121]

executor being authorized to carry on that trade, making from day to day a great variety of engagements, or, as it has been put, entering into one great and important engagement, but also authorized by the will to do many other acts, which he must equally do in a due administration under the Will, wherever for the benefit of one child the trade is directed to be carried on, all the * other objects of the Will must at any distance of time be considered, to the extent of the property they take, security for the creditors on the trade.

Such a decision was never made previously to *Hankey v. Hammock*. I am not aware, that such a decision has ever been made since that case. We may recollect cases not consistent with the supposition, that the law is according to that decision. It is necessary to look into other cases, from which it may appear, that it was not present to the mind of the Court, that there was such a rule. The difficulty also, that must exist in a variety of instances, is to be considered: the case, that has been put, where a tradesman directs the trade to be carried on for the benefit of a son, giving him a legacy of 50,000*l*. It is difficult to say, that legacy must not be liable; and yet it is very difficult to say, it shall be liable, consistently with saying, legacies to others shall not; unless upon this, that the legacy is given by the same Will, for the benefit of the same person, who is to have the benefit of the trade; and yet I do not know, that is a principle of distinction, by which I can abide. But, in the ordinary case, the eldest son, made residuary legatee and executor, and ordered to carry on the trade for the benefit of another child, cannot possibly withdraw his residuary legacy from the liability the trade carried on would impose upon him personally; for he makes himself personally liable; and therefore with reference to the property, taken from his father, though not liable as legatee, he becomes liable, as a
 person

person carrying on the trade; his legacy assisting the means of his responsibility in carrying on the trade. That person, therefore, both legatee and executor, must answer for his acts as to the trade. Then why should not another legatee? The answer is, that person is liable, not as legatee; but upon the ground, that the *property is part of his general substance, and he may spend it, notwithstanding his liability as executor. So may another legatee: but the power of spending his general substance shews, there is no great convenience in this doctrine.

1804.
GARLAND,
Ex parte.

[*122]

In this case, I fear, I shall be under the necessity of contradicting the authority of a Judge I most highly respect; feeling a strong opinion, that only the property, declared to be embarked in the trade, shall be answerable to the creditors of the trade. If I am not bound by decision, the convenience of mankind requires me to hold, that the creditors of the trade, as such, have not a claim against the distributed assets, in the hands of third persons under the direction of the same Will, which has authorized the trade to be carried on for the benefit of other persons.

The Lord CHANCELLOR.

My opinion upon this case is, that it is impossible to hold, that the trade is to be carried on, perhaps for a century; and at the end of that time the creditors, dealing with that trade, are, merely because it is directed by the Will to be carried on, to pursue the general assets, distributed perhaps to fifty families.

Aug. 13th.

The Order was, that the proof should stand in respect of the sum of 768*l.* 12*s.* 4*d.*; without prejudice to filing a bill.

No bill was filed.

1803.

July 25th.

1804.

Aug. 13th.

Though an agent may within the scope of his authority bind his principal by his agreement, and in many cases by his acts, evidence of his declarations is confined to what is, either by the statement itself, or as tending to determine the quality of cotemporary acts, the foundation of, or inducement to, the agreement.

In this instance the agency was not made out.

FAIRLIE v. HASTINGS.^v

THE bill originally (35) filed by *Maha Rajah Nobkissen*, and revived after his death by his administrators, and the attornies to prosecute this suit, on account of his son and heir *Maha Rajah Rajekissen Bahaudur*, who was a Co-plaintiff, against *Warren Hastings*, Governor-general of *Bengal*, stated, that in *July* 1780, the Defendant applied to the original Plaintiff *Rajah Nobkissen*, for the loan of three lacks or 300,000 sicca rupees, of the value of 37,500*l.*, upon the security of the Defendant's bond; which sum *Nobkissen* agreed to advance by instalments. A bond was accordingly executed by the Defendant, and was offered by *Caunto Baboo*, an agent of the Defendant, to *Nobkissen*; who declined accepting it, until the whole loan should be paid; and it was therefore agreed, that the bond should remain in the possession of *Caunto Baboo*, until the money should be paid; at which time it was to be delivered to *Nobkissen*.

The bill farther stated, that the money was paid accordingly by instalments. Afterwards, upon application by the Plaintiff to *Caunto Baboo* for the bond, he at first promised, that it should be delivered, and afterwards, that the money should be paid before the Defendant's departure for *Europe*; but repeating the application, when the Defendant's departure was rumoured in *Calcutta*, the Plaintiff was informed by *Caunto Baboo*, that he had delivered up the bond to the Defendant. The bill prayed, that the bond may be delivered up, or the money paid with interest.

The

(35) *Nobkissen v. Hastings*, 4 Bro. C. C. 252. Ante, Vol. II, 84.

The Defendant admitted the loan of 300,000 sicca rupees at 5*l. per cent.* through *Caunto Baboo*; and that the Plaintiff received two bonds from the Defendant for that sum, dated the 26th of *July*, 1780, which bonds, the Plaintiff having requested the Defendant to receive the money as a gift, were afterwards delivered up to him by the Plaintiff; and the Defendant, having at a subsequent period, in consequence of the Plaintiff's said request accepted such gift for the benefit of the *East India* Company, cancelled the bonds, with the consent of the Plaintiff, and to the best of his recollection and belief, in the Plaintiff's presence; and the Defendant denied, that he assented to the loan upon the terms of having any bond delivered to *Caunto Baboo*, &c. as stated by the bill: on the contrary, to the best of the Defendant's knowledge and belief, the said bonds were delivered by the Defendant to the Plaintiff himself. When the bonds were first given up to the Defendant, he did not come to any resolution respecting his acceptance of such discharge: but, the distresses of the *East India* Company being afterwards considerable, he resolved to accept the money as a gift for the use of the Company, and to apply it in satisfaction of certain disbursements by him before made on their account; and the money was applied accordingly.

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FAIRLIE
v.
HASTINGS.
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The Plaintiff went into evidence. *Ramneedy Bounagee*, employed by the late Plaintiff in his pecuniary concerns, as to lending and borrowing money, by his depositions stated applications to the Plaintiff by *Gobindee Baboo*, a cash-keeper employed by *Caunto Baboo*, for the loan of three lacks of rupees to the Defendant. The deponent, in 1780, in consequence of instructions from the Plaintiff, procured and paid the money by instalments to *Gobindee Baboo* for the Defendant; and in *December* 1780 applied to *Caunto Baboo* respecting the delivery of the Defendant's bond for the money lent him.

Caunto

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 FAIRLIE
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 HASTINGS.
 [* 125]

Caunto Baboo answered, that as the money had been paid * at different times, he had returned the bond to the Defendant, who would calculate the interest, and give a bond for the whole. This witness stated other conversations, upon the Plaintiff's remonstrances; and, that the whole money remains due.

Guddadhar Sain, another witness, stated, that *Caunto Baboo* managed the pecuniary concerns of the Defendant; that an application was made by *Gobindee Baboo*, cash-keeper to the Defendant; who said, the Defendant's bond was in the hands of *Caunto Baboo*, ready to be delivered. The deponent was cash-keeper to the Plaintiff; also his banker. The money was paid to *Gobindee Baboo* at different times. The deponent applied to *Caunto Baboo* for the bond; who said, he would procure it; and afterwards said, he had spoken to the Defendant; who said, he would give a bond for the whole amount, with interest, previously to his departure for *Europe*. This witness also stated, that the money was not paid, and is still due.

Punchanund Sircar stated, that he made entries in the books of account of the Plaintiff, to the amount of three lacks of rupees, to the Defendant through *Caunto Baboo*; not specifying, whether it was not a loan or gift. The year following, by the direction of the Plaintiff, the deponent debited the Defendant.

The cause having been argued at great length, stood a considerable time for judgment.

The MASTER of the ROLLS.

Aug. 13th.

The subject of this cause is a loan of money by the late Plaintiff *Maha Rajah Nobkissen* to the Defendant. As it is not by bill in equity that money lent is to be recovered,

recovered, it is incumbent upon the Plaintiff to state, and to prove, some ground for coming into this Court for the payment, or the means of obtaining payment of his demand. The question of jurisdiction must depend upon the allegations of the bill; which states, that the Defendant applied to the Plaintiff for the loan of three lack of rupees upon the security of the Defendant's bond; that the Plaintiff agreed to advance that sum by instalments; that a bond was executed; which it was agreed should remain with *Caunto Baboo*, an agent of the Defendant, until the whole money should be advanced, and then should be delivered to the Plaintiff; that the money was advanced, but the Plaintiff never received the bond; *Caunto Baboo* in answer to his repeated applications at length informing him, that it had been delivered up to the Defendant.

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FAIRLIE
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HASTINGS.

In support of this statement the Plaintiff has not read, and could not read, any part of the answer. But the Plaintiff has gone into evidence of declarations by *Gobindee Baboo* and *Caunto Baboo*; and the question is whether these declarations can amount to proof of such facts as are alleged by the bill. Upon that question my opinion is, that these declarations do not come within the principle, upon which they are supposed to be admissible. As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The Exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal, by his agreement; and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal: or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be

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be admitted to prove, the agent did make that statement or representation. So, with regard to acts done, the words, with which those acts are accompanied, frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But except in one or the other of those ways I do not know, how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business, in which the person making that assertion was employed as agent. For instance, if it was a material fact, that there was the bond of the Defendant in the hands of *Caunto Baboo*, that fact would not be proved by the assertion, that *Gobindee Baboo*, supposing him an agent, had said, there was; for that is no fact, that is, no part of any agreement which *Gobindee Baboo* is making, or of any statement, he is making, as inducement to an agreement. It is mere narration; communication to the witness in the course of conversation; and therefore could not be evidence of the existence of the fact.

The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission: and is not permitted to contradict it. But it is impossible to say, a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion. Lord *Kenyon* carried this so far as to refuse to permit a letter by an agent to be read to prove an agreement by the principal; holding, that the agent himself must be examined:

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* *Maesters v. Abram* (36). If the agreement was contained in

(36) 1 *Esp. N. P. Cas.* 375.

in the letter, I should have thought it sufficient to have proved, that letter was written by the agent: but, if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected. This doctrine was discussed incidentally in *Bauerman v. Radenius* (37); and in that case there is a reference to another (38), in which Mr. Justice *Buller* held, that a receipt given by an agent for goods, directed to be delivered to him, might be read in evidence against the principal. The Counsel in *Bauerman v. Radenius* state, that the contrary had been frequently since held by Lord *Kenyon* at *Nisi Prius*, without its having ever been questioned. That statement does not appear to have been denied upon the other side; and seems to have been acquiesced in by Lord *Kenyon*; who said, "that was not the point, upon which the case was argued or determined;" meaning the point, that such a receipt could be admitted in evidence.

It will be found however, that this question can hardly be said to arise in this case; when it is considered, what the concern of *Caunto Baboo* in this transaction was, and what are the facts, in proof of which his declaration was offered. *Caunto Baboo* is stated to have been in the employment of the Defendant. One of the witnesses says, he had the general management of his pecuniary concerns. But of this particular transaction he does not appear, either by the bill or the witness, to have had the management. Upon the whole of the statement and evidence it does not appear, that *Caunto Baboo* was concerned in the negotiation of the loan; that he was employed as the agent for this purpose. The statement of the bill represents the Defendant himself to have made the agreement: therefore any representation of

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Letter by an agent is not evidence against the principal of a pre-existing agreement, though it may be, of an agreement contained in that letter.

Whether a receipt given by an agent for goods, directed to be delivered to him, is evidence against the principal.
Qu.

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(37) 7 Term Rep. 663.

(38) *Biggs v. Lawrence*,
3 Term Rep. 454.

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of *Caunto Baboo* relative to an agreement, not stated to have been made by him, would not be the statement of an agent: supposing, such statement was to be admitted in evidence. The Plaintiff fails first in shewing, *Caunto Baboo* was the agent of the Defendant. In this case, such a fact as *Caunto Baboo* is represented to have stated, is matter, not of admission, but of testimony. A man cannot admit what another has done, or has agreed to do: but he must prove it. When put upon the proof, that the Defendant made the agreement, it is absurd to say, *Caunto Baboo* admitted, he made it. In truth he does not admit, that the Defendant made it. But, suppose *Caunto Baboo* distinctly proved the agent of the Defendant, and that he said, he knew, the Defendant did make the agreement for this loan, and did promise and undertake to give a bond for the money, and did execute a bond, but gave the bond, not to the Plaintiff, but to the witness, and he gave it back to the Defendant, who undertook to calculate the interest, and to give a bond for the whole: all this would be no evidence whatsoever of what the Defendant had agreed to do, or had done, or omitted to do; and without evidence of his agreement, or his acts, or his breach of agreement, it is utterly impossible to support this bill.

The Bill was dismissed.

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May 7th, 8th.

Aug. 13th.

As between
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 tatives money
 considered
 land under a

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BY indentures of settlement, dated the 8th of *August*, 1765, previous to the marriage of *George Thornton* and *Frances Wildash*, reciting the intended marriage, and
 direction in a settlement with all convenient speed, after request, to lay it out; though no request was made; upon the construction, all the limitations being adapted to real uses, and other circumstances.

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and that for making a jointure, and for making provision for the issue of the marriage, *Thomas Thornton*, the father of *George*, had agreed to transfer the sum of 10,000*l.* Bank Annuities, at 4 *per cent.* to trustees, upon the trusts after mentioned, and that he had transferred, &c. it was declared, that the said sum of 10,000*l.*, 4 *per cent.* Bank Annuities were so transferred upon trust, after the marriage, that the trustees, or the survivor, his executors or administrators, or such others, on whom the trusts thereby created should or might devolve, or come by virtue of these presents, should with all convenient speed after request to them for that purpose made by the said *George Thornton* and *Frances*, his intended wife, or the survivor of them, or the executors or administrators of such survivor, sell, assign, and transfer, the said sum of 10,000*l.* Bank Annuities, at and for such reasonable price and prices as could be had for the same; and should, (with the consent and approbation of the said *George Thornton* and *Frances*, his intended wife, or the survivor of them, or the executors or administrators of such survivor) lay out and dispose of the money arising by the sale of the said Bank Annuities, in the purchase of manors, freehold messuages, lands, tenements, and hereditaments, of an estate in fee-simple, in the county of *Kent*, or elsewhere, within 60 miles of *London*; and convey the same to the use of *George Thornton* for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to *Frances Wildash* for life, for her jointure, in bar of dower; remainder to the use of every or such one or more of the children of the said *George Thornton*, on the body of the said *Frances Wildash* lawfully to be begotten, for such estates, and in such proportions, as they should jointly by deed or writing, &c. appoint; and for want of, and until, and after the determination of the estates to be appointed, and as to such parts, whereof no appointment should be


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made, to the use of all and every the child and children as well daughters as sons, to be equally divided between, or among them, if more than one, share and share alike, as tenants in common in tail general, with cross remainders; and in default of issue, to the use of *George Thornton*, his heirs and assigns for ever.

It was farther declared, that until such purchase of manors, &c. to be settled as aforesaid, it should be lawful for the said trustees, and the survivor of them, and such others, on whom the trusts thereby created might devolve, from time to time, with the consent and approbation of the said *George Thornton* and *Frances*, his intended wife, or the survivor, in writing, testified, as therein mentioned, and after their deceases, at the trustees' own discretion, to sell or dispose of, or receive in, the said 10,000*l.* Bank Annuities, or any part or parts thereof; and to place out the money arising by such sale or sales, or received in, as aforesaid, upon real or Government Securities, subject to the trusts before mentioned; and, that the dividends, interest, and proceeds, of the said sum of 10,000*l.* Bank Annuities, and other securities, in which the money arising by sale thereof should be invested, should in the mean time, until such purchase or purchases of manors, &c. should be made and settled, as aforesaid, go and be paid to, and received by, the person or persons, to whom the rents, issues, and profits of the manors, &c. so to be purchased, as aforesaid, would go, and for the time being belong and appertain, in case such purchase or settlement were made, as aforesaid.

The marriage took place. *George Thornton* by his Will, dated the 5th of *July*, 1766, duly executed, to pass real estate, among other things, and without taking notice of the settlement, gave and devised all and  
 \* every his messuages, lands, tenements, hereditaments,  
 and

and real estate, whatsoever and wheresoever, with the appurtenances, unto and to the use of his son *George Thornton*, and all and every other the son and sons of his body lawfully begotten, or to be begotten, to be equally divided between them, (if more than one,) share and share alike, as tenants in common, and not as joint tenants, and the several and respective heirs of the bodies of all and every such son and sons lawfully issuing; and in case one or more of such sons should happen to die without issue, then as to the share of him or them, so dying without issue, unto, or to the use of the survivor or survivors of them, to be equally divided as aforesaid, and their several and respective heirs; and if all such sons but one should die without issue, or, if there should be but one such son, then unto and to the use of such surviving and only son, and the heirs of his body; and, for default of such issue, unto and to the use of all and every his daughters, as therein expressed, and, for default of such issue, to his uncle *John Thornton*, his heirs and assigns for ever.

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In *April 1767*, *George Thornton* died, leaving his wife and two children, *George* and *Isaac-Thomas* (39), surviving him; of whom, the latter died in *December 1767*; and the former in 1769, both unmarried, and infants. *John Thornton*, great-uncle of *George Thornton*, the younger, was heir at law to him and his father. *John Thornton* by his Will, dated the 13th of *May, 1776*, gave and devised all his freehold estates in *Kent* and *Middlesex* to his eldest son *Thomas Thornton*, his heirs and assigns for ever; and died in 1789. The Bank Annuities continued standing in the names of the original trustees till 1789; when they were paid off by Government; and the trustees, with the consent of *Frances Thornton*, laid out the money in Bank Stock,  
 upon

(39) He was a posthumous son.

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upon the trusts of the settlement; in which fund it remained; no part having been laid out in a purchase of land.

Frances Thornton, having married *Leonard Bartholemew*, died in 1801. Her husband obtained administration to her, and also to her two sons by *George Thornton*. Upon her death the bill was filed by *Thomas Thornton*; praying, that he may be declared entitled, as heir at law of *John Thornton*, to the trust fund; and that the trustees may be decreed to transfer to him; insisting, that it was to be considered as real estate.

The Defendant *Bartholemew* by his answer, suggested, that neither *George Thornton* the father, nor his wife, ever requested the trustees to lay out the fund in a purchase of land; and therefore insisted, that it was to be taken as personal estate, and that he was entitled as personal representative of his late wife and her two sons.

Mr. *Piggott*, Mr. *Lloyd*, and Mr. *Stanley*, for the Plaintiff.


The question is, whether this fund of stock is in this Court to be considered money or land. By this settlement it is imperatively destined to be land. The limitations are all applicable to real estate: none to personal property: viz. a strict settlement of it, as land, with cross remainders, &c. By considering it otherwise that object will wholly fail; each child taking one moiety of the money absolutely. The rule of the Court upon this point is settled by *Lechmere v. Lord Carlisle* (40), *Symons v. Rutter* (41), *Walker v. Denne* (42), and

(40) 3 *P. Will.* 211.

(42) *Ante*, Vol. II, 170.

(41) 2 *Vern.* 227, cited 3 *P.* See the note, I, 204.
Will. 218.

and *Wheldale v. Partridge* (43). In the last of these cases, which was very much considered, and in *Walker v. Denne*, it was plain from the terms of the settlement, that an option was intended; and that is the only exception. Lord *Hardwicke's* reasoning in *Earlom v. Saunders* (44) is applicable. In *Pulteney v. Lord Darlington* (45), Lord *Thurlow* concurs with the opinion of Lord Commissioner *Hutchins* in *Symons v. Rutter*.

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Mr. *Romilly*, for the Defendant *Bartholemew*.

It is perfectly settled, that, where money is directed to be laid out in land, or land to be converted into money, a Court of Equity will consider that as done, which is directed to be done, and will treat the subject accordingly. The words of Sir *Thomas Sewell* in *Fletcher v. Ashburner* (46) are adopted by Lord *Alvanley* in *Wheldale v. Partridge*. So the question in this case is, whether the character of land is imperatively fixed upon this money. A clear intention is expressed, that the conversion is to be "after request." Can that be construed to mean *before* request? It is supposed, that those words mean the same as "with consent and approbation." Upon that a late case, *Saunders v. Kinsey* (47), before Lord *Rosslyn*, is a direct and strong authority, that, where consent and approbation are required, the trustees cannot lay out the money without that consent and approbation expressed. The money was to be invested in land, with the consent of the husband and wife, or, if they were dead, of the guardians, in writing. If it was to be considered money, a recovery would not have been necessary. Lord *Redesdale*,

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| (43) Ante, Vol. V, 388;
VIII, 227. | (46) 1 Bro. C. C. 497. |
| (44) Amb. 241. | (47) Stated from the Decree. |
| (45) 1 Bro. C. C. 223. | |

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*dale*, then *Attorney-General*, was of opinion, that there was error in the decree, directing the money to be laid out absolutely in land. That opinion was adopted by Lord *Rosslyn*; and so clearly, that, though a recovery would have set it right, the decree was reserved.

The case upon this settlement is much stronger than that, requiring merely consent and approbation. Here the husband and wife must take an active part; and require something to be done. As to *Earlom v. Saunders*, the Court has always leaned against giving a power to trustees to determine, whether the one or the other representative shall take.

*The MASTER of the ROLLS.*

This is a case of considerable difficulty. The law is sufficiently clear. The difficulty is in its application to particular cases, or rather, to particular instruments. This settlement is ill framed for carrying into execution the different purposes imputed to it. It was injudicious to insert words, making it depend upon the intention of the father and mother, if the purpose was absolutely an investment in land. On the other hand, if it was intended to give the father and mother an option, it was injudicious to adapt all the limitations to a purchase of land, and no other case; and the disposition of the dividends in the mean time to the same persons, to whom the rents and profits of the estates to be purchased would go, shews, it is to be money only for a temporary period; and, that there is to come a time, when it is to be laid out in land. In *Wheldale v. Partridge* the Court upon the whole gave effect to the apparent intention of the parties, as collected from the limitations, in opposition to the positive words at the outset of the settlement.

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The question is, whether according to the true construction of this marriage settlement the Stock was absolutely and at all events to be laid out in land; or, whether it was to remain as money, and to be disposed of and distributed as such, unless the intended husband and wife, or the survivor, or the executors or administrators of the survivor, should make a request to the trustees to lay it out; and should approve a purchase, in which it should be invested. It is admitted, that according to the whole scope of this settlement, made upon the supposition, that the fund was to be considered as land, all the limitations in it apply to land. There is no one limitation in the whole of the settlement, that applies to the fund as money. But a doubt arises upon the words in that clause, in which the trustees are directed to lay out the money with all convenient speed after request made by the intended husband and wife, or the survivor, or the executors or administrators of such survivor. It is contended therefore, that, unless the husband and wife, or the survivor, &c. did make a request to the trustees, they had no right to act, and of their own authority to invest the fund in land. The question depends entirely upon those words. "after request to them for that purpose made," &c. and "with the consent and approbation," &c. It is contended, that the intention was to leave it entirely as money; and that it was fortuitous and contingent, whether it should assume the character of land. If that was so, it is singular, that there is not a provision in the whole deed, having any reference to the fund, considered as money; for all the limitations in the deed affect to dispose of it as land. There is an estate for life, without impeachment of waste to the husband: an estate to the wife for life by way of jointure; with remainders to the children, as tenants in common in tail; with cross-remainders; and the ultimate limitation

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case the surviving child died in his infancy. It never vested therefore in any one, who could determine, whether it should be money or land; and we must go back to the deed; upon which the true construction is, that it must be considered land.

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LADY ARUNDELL v. TAUNTON.

Aug. 4th.

A purchase by a married woman from her husband, through the medium of trustees for her separate use and appointment, may be sustained against creditors; [* 140] if *bonâ fide*; though the

A MOTION was made in each of these causes for an Injunction to restrain the disposition of goods, taken in execution under judgments obtained in the Court of *King's Bench* by creditors against Lord *Arundell*, until answer or farther order. The motions were made without notice, upon certificate of the bills filed, under the following circumstances.


By indentures, dated the 29th of *April*, 1800, reciting the marriage settlement of Lord and Lady *Arundell*, dated the 23d and 24th of *April*, 1764, settling several estates in the county of *Lincoln*, part of the family estates of Lady *Arundell*, to the use of Lord and Lady *Arundell*

husband is indebted at the time; and even though the object is to preserve from his creditors for the family the subject of the purchase: in this instance ancient family pictures, furniture, and other articles, of a peculiar nature and value.

The circumstances of the comparative value of the consideration, the continued possession, (according to the title, by the relation of the parties), the degree of notoriety, the want of an inventory, the satisfaction of some debts out of the property, &c. though circumstances of evidence, are not conclusive, as to the nature of the transaction.

Injunction upon the jurisdiction to protect the enjoyment of a specific chattel, not properly the subject of compensation by damages.

Arundell for their lives and the life of the survivor, with remainders in strict settlement to the second and subsequent sons, and lastly to the eldest son, in tail male; and, in default of such issue, to such persons, for such estates, intents, and purposes, as Lady *Arundell* notwithstanding her coverture should by any deed or writing under her hand and seal, with or without power of revocation, or by her Will, attested by three witnesses, either absolutely or conditionally direct, limit, or appoint, and, in default of appointment, to her right heirs; and reciting, that the premises were subject to incumbrances by mortgage to the amount of 3716*l.*, and to two sums of 10,000*l.* each under the marriage settlements of the two daughters of Lord and Lady *Arundell*; and that there was not any issue male of Lord and Lady *Arundell*, nor a probability of any; and farther reciting, that Lord *Arundell* was indebted to several persons in considerable sums, and that the sums, before mentioned to be charged on the estates of Lady *Arundell*, were raised for Lord *Arundell*, and received and applied by him for his own use, except 2416*l.*, expended in inclosing upon the estates; and that Lord *Arundell* is debtor to the estate of Lady *Arundell* in the whole of the said mortgage debt of 3716*l.*, except the said sum of 2416*l.*; and also reciting, that Lord *Arundell* was possessed of paintings, drawings, engravings, prints, statues, medals, plate, jewels, china, glass, fixtures, linen, articles of ornament and furniture, books, manuscripts, and implements of household and husbandry, in or about his mansion-houses, chapels, gardens, &c. at *Wardour*, *Lanherne*, and *Irnham*; that several of the creditors of Lord *Arundell* are very urgent for payment; and that it had been proposed and agreed by Lord and Lady *Arundell*, that the sum of 12,000*l.* should be charged upon • the said estates of Lady *Arundell*, and applied in discharge of the debts of Lord *Arundell*, and that the said estates should in default of issue male, entitled under the

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the settlement of 1764, be settled to the use of the two daughters of Lord and Lady *Arundell*, and their respective issue, as therein mentioned; subject to a power for Lady *Arundell* to charge a sum of 3000*l.* and an annual sum not exceeding 200*l.*; and that Lord *Arundell* should be released from the sum, in respect of the part of the said mortgage debt, owing by him to the estate of Lady *Arundell*; and that in consideration thereof Lord *Arundell* should assign to trustees for the separate use of Lady *Arundell* the paintings and other articles, before mentioned; and farther reciting, that, in pursuance and part-performance of the said agreement, by indentures of even date (with similar recitals) Lady *Arundell*, in pursuance of an agreement between Lord *Arundell* and her, and with his privity and approbation, and in exercise of her power under the settlement of 1764, appointed the settled estates after the decease of the survivor of Lord and Lady *Arundell* and failure of their issue male, entitled under the settlement, to the use of Lord *Clifford* and *James Everard Arundell*, their heirs and assigns; and Lord and Lady *Arundell* accordingly conveyed, subject and charged, as aforesaid, to the use of the said trustees, their executors, &c. for the term of 99 years, without impeachment of waste; if Lord and Lady *Arundell*, or the survivor, should so long live, and, subject thereto, to the use of Lord and Lady *Arundell* and the survivor, the trustees to preserve contingent remainders, and the issue male, &c. by way of continuation of the uses of the settlement of 1764; and after the determination of the said uses, or when they shall be incapable of taking effect, to the use of Lord *Clifford* and Mr. *Arundell*, their heirs and assigns, upon the following trusts: viz. that they should with all convenient \*speed after the execution of the indentures by mortgage, sale, or other disposition, out of the term or inheritance raise the sum of 12,000*l.*; and pay the same to such person or persons, and for such intents and purposes, as

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*Lady Arundell* should by deed or instrument in writing, with two or more witnesses, from time to time, appoint, and, in default of appointment, to *Lady Arundell*, for her separate use; and subject thereto should be seised and possessed of the term and inheritance to such uses as *Lady Arundell* should by deed or will appoint, and, in default of appointment, to her, her heirs and assigns; with a covenant by *Lord Arundell*, that he and *Lady Arundell* would levy a fine, to enure to the said uses; IT WAS WITNESSED, that in farther performance of the said agreement, and in exercise of her power, *Lady Arundell* appointed, that *Lord Clifford* and *Mr. Arundell*, their heirs, executors, &c. should pay and apply the sum of 12,000*l.*, which they were by the said indenture directed to raise, in discharge of such of the debts, owing by *Lord Arundell*, as he, his executors or administrators, should by any writing or writings under his or their hands direct or appoint, and subject to raising the said sum, should during the joint lives of *Lord* and *Lady Arundell* pay the rents and profits, as *Lady Arundell* should by any writing from time to time appoint; and, in default of appointment, to her separate use; and, in case *Lord Arundell* should die in the life of *Lady Arundell*, that they should pay the rents, &c. to *Lady Arundell* for life; but, if *Lord Arundell* should survive her, then according to her appointment by Will; and in default thereof to *Lord Arundell* for life; and after the decease of the survivor of *Lord* and *Lady Arundell*, and failure of their issue male, entitled under the indenture of 1764, should convey the estates to the use of the two daughters, or one of them, or their issue, according to the appointment of *Lady Arundell* by Deed or Will; and, in default of appointment, in moieties in strict settlement; remainder to the right heirs of *Lady Arundell*.

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The settlement then proceeded to declare the said estates the sole security for the money raised on mortgage by Lord and Lady *Arundell*; discharging Lord *Arundell*, his heirs, executors, &c. and gave powers to Lady *Arundell* by Deed or Will, subject to the said sum of 12,000*l.*, to charge the sum of 3000*l.*, and an annuity, not exceeding 200*l.*; and gave the usual powers of leasing, selling, exchanging, &c.; and in consideration thereof Lord *Arundell* bargained, sold, assigned, &c. to Lord *Clifford* and Mr. *Arundell*, their executors, &c. all the paintings, drawings, &c. at the mansion-houses of *Wardour*, &c. in trust to dispose thereof according to the appointment of Lady *Arundell* from time to time, as if she were unmarried, by Deed or Will; and in default of, or until, appointment, and so far as no such appointment shall extend, to permit Lady *Arundell* to use and enjoy the said paintings and other articles, for her separate use, without being subject to the debts, controul, interference, or engagements, of Lord *Arundell*; and after her decease to assign the said articles to the persons, who would be entitled under the Statute of Distributions after her death, if she should survive Lord *Arundell*.

The Deed contained a covenant by Lord *Arundell* to deliver to the trustees an inventory of the said articles within six months, and for farther assurance, &c.

A fine was levied according to the covenant.

A verdict had been recently given for the Plaintiff in a cause, in the Court of King's Bench, upon an action
 [*144] • brought by a creditor of Lord *Arundell* against the sheriff of the county of *Wilts* for a false return of *Nulla Bona* to a writ of execution upon a judgment against Lord *Arundell*; involving the point as to the validity of the indentures of *April* 1800 as against creditors. The
 Bill

Bill stated, that the verdict was contrary to law and fact; and suggested an intention to move for a new trial; that the Defendants *Foxhall* and *Taunton* had sued out execution upon the judgments obtained by them against Lord *Arundell*; that the sheriff had seised the furniture, &c.; and threatened to sell it, before an application could be made for a new trial.

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Mr. *Richards*, Mr. *Romilly*, and Mr. *Hall*, in support of the Motion.

The object of Lord and Lady *Arundell* in this transaction was, that Lady *Arundell* should become the purchaser of these articles, of great and particular value to this family, and partly to satisfy debts of Lord *Arundell*; who without doubt was indebted at the time. The transaction was public. The sum of 12,000*l.* was actually paid by Lady *Arundell*, as the purchase-money upon the assignment of the articles under this deed; and was applied in payment of the creditors of Lord *Arundell*. The distinction, taken at the trial, upon which this deed was considered void, was, admitting that chattels, vested in trustees for the separate use before marriage, would be protected from the debts of the husband, that this purchase was after marriage. There can be no difference, whether it was before or after marriage. Great stress also was laid upon the circumstance, that the possession was with Lord *Arundell*, as complete evidence of fraud. That is no evidence of fraud; if the possession is according to the title. There is a great difference in bankruptcy. But an Act of Parliament (48) was necessary for that. Upon that ground many decisions of this Court must be wrong. The object of this application is to restrain the Defendant from proceeding under an execution, now in the house; until an

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(48) Stat. 21 Jac. I, c. 19, s. 10, 11.

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an opportunity can be had of moving for a new trial in an action in the Court of *King's Bench* by another creditor against the Sheriff, for a false return of *Nulla Bona*; in which the Plaintiff obtained a verdict, upon the ground, that the deed was void.

*The Lord CHANCELLOR.*

Upon this case, I believe, my decision in the Court of *Common Pleas* (49) was disputed. My opinion upon the trial of that cause was, that possession is only *prima facie* evidence of fraud; and as that property could not be reached by bankruptcy, and the possession was according to the deed, which created the title, and the title was publicly created, that was not a fraudulent possession against the creditors in general; and upon a motion for a new trial the Court agreed with me. With great deference, if Lord *Ellenborough* thinks otherwise, I am at present of the same opinion; and I am also at present of opinion, upon the doctrine of this Court, that if the purchase by the wife is *bona fide*, it is of no consequence, whether it is before or after marriage. The mere circumstance of possession of chattels, however familiar it may be to say, that it proves fraud, amounts to no more than that it is *prima facie* evidence of property in the man possessing, until a title, not fraudulent, is shewn, under which that possession has followed. Every case from *Twyne's Case* (50) downwards supports that; and there was no occasion otherwise for

[ •146 ] • the Statute of King *James* (51). Can there be any doubt, that a married woman, having separate property, may buy an interest in the property of her husband by a settlement under the direction of this Court?

The

(49) *Kidd v. Rawlinson*,  
 2 Bos. & Pul. 59.

(51) Stat. 21 Jac. I, c. 19,  
 s. 10, 11.

(50) 3 Co. 80.

The injunction was granted, upon undertaking not to remove the goods.

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In *Hilary* Term a motion was made in the Court of *King's Bench* for a new trial in the case of *Dewey v. Bayntun*; and a rule was granted; which was afterwards made absolute; and the cause was tried a second time, in the Sittings after *Trinity* Term; when a verdict was again obtained by the Plaintiff (52).

Mr. *Alexander* and Mr. *Leach*, for the Defendant *Taunton*, had obtained an order for dissolving the injunction, unless cause, upon the answer; representing that Lord *Arundell* continued in possession of the furniture, &c. after the execution of the deeds; that the transaction was merely colourable; and that the deeds were void as against creditors.

Aug. 4th.

Mr. *Richards*, Mr. *Romilly*, and Mr. *Hall*, for the Plaintiff, shewed cause; insisting, that a married woman may purchase with her own property other property, which she may have limited to her separate use; and such a limitation is good in point of law, not a fraud upon any person; and she has a right to hold against the creditors of her husband. The only grounds, upon *which at the last trial the *bona fides* of the transaction was put to the jury, were, that there was not sufficient publicity; that there was no inventory; not considering at all, whether Lady *Arundell* had paid valuable consideration. The* circumstance, that no inventory was annexed to the deed, is of no weight; *Jarman v. Woollaton* (53). How was it to be made more public and notorious?
The

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(52) See the report of trial, 6 *East*, 257.
Dewey v. Bayntun, upon the (53) 3 *Term Rep.* 618.
second motion for a new

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The joint possession being consistent with, and referable to, the title under this deed, there could be no fraud.


*The Lord* CHANCELLOR.

I granted this injunction on the ground, that this bill was brought; stating, that Lady *Arundell* was according to law to be considered equitable owner of goods and chattels of a very special and peculiar kind; that she became so under a contract of purchase; which she insisted she was entitled, in a mode, to make with her husband himself; that she had contracted with him for the ownership; and instruments were executed, placing the legal property in trustees for her use and benefit; and, attending to all the circumstances, her title, as administered in this Court, and the title of her trustees, as administered in other Courts, are as incapable of being impeached, as they were upon the date of the instrument; that an action was brought by a creditor; and the Sheriff was prevailed on to return *Nulla Bona*. An action was brought against him for a false return by the creditor; insisting, he might have had possession of these goods and chattels, either the property of Lord *Arundell*, or in a question between him and his creditors and all other persons, including Lady *Arundell* and her trustees, liable to her husband's creditors. The form of the action being against the Sheriff, it depended upon some arrangement in the Court of Law, whether the

[ • 148 ] \*trustees or the wife could maintain the question, that these were not the goods of Lord *Arundell*, or liable to execution by his creditors: what arrangement I do not know: but I do not think myself at liberty to surrender the jurisdiction of this Court, because the Court of *King's Bench* may by some arrangement execute the jurisdiction of a Court of Equity. It is my duty to give the Plaintiff relief according to the rules and proceedings in this Court, if she is entitled to sue here; and Lady *Arundell* from the nature of her title had a right to have it decided here by some mode of proceeding.

Another

Another ground, upon which Lady *Arundell* is entitled to relief here is, that from the very nature of the property in question, the quality and nature of the property, alleged to be purchased, the purpose and object of the purchase, it is quite impossible for her to have the benefit of it, if a *bond fide* transaction, unless she can specifically enjoy it; and this Court having in many instances interposed to protect the enjoyment of a specific chattel (54), the question is, whether the very object and subject of the contract do not make it necessary to consider, whether the Court cannot give the specific relief of fixing in the trustees the very property, instead of the amount in damages.

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From the only account (55) I have had of this case, in the Court of *King's Bench*, it appears to have been asserted, that a husband and wife could not after marriage contract for a *bond fide* and valuable consideration for a transfer of property from the husband to the wife or trustees for her. The doctrine is not so either here or at law. I stated before what I conceived the doctrine of this Court and of the law upon this subject. There have been two trials; as there was a mistake in point of law upon the first. As to the subsequent trial I know nothing, except what is said here. But if the case is finally to be decided here, there are many points, deserving great consideration, and very fit for discussion; as connected with every fact and circumstance of the case in detail; as bearing upon the question, whether this instrument is fraudulent against creditors. When Lord *Mansfield* upon this subject speaks of trick and contrivance (56), he ought to state, what the law

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|-------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------|
| (54) Ante, <i>Fells v. Read</i> ,<br>Vol. III, 70; and the note,<br>III, 73. <i>Lloyd v. Loaring</i> ,<br>VI, 773. Post, 163. | <i>Dewey v. Bayntun</i> was not at<br>that time published.<br>(56) <i>Cowp.</i> 435, in <i>Cado-</i><br><i>gan v. Kennet</i> . |
| (55) Mr. <i>East's</i> Report of                                                                                              |                                                                                                                                |

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law denominates trick and contrivance. For instance, in this case, if the purpose of this instrument was to defeat creditors, it is said to be bad. I desire, that may be reconsidered. If the express object of the purchase was to vest this property, of the value of 12,000*l.* in trustees, to transmit to the daughters of Lady *Arundell*, if she paid the value, 12,000*l.*, to the creditors of Lord *Arundell*, that is not illegal. It is assuming a great deal to say, it is delaying or defeating the creditors. But, if so, it has in all time been sanctioned by this Court and courts of law too. If the property transferred was of the immense value, at which this has been stated, certainly then it ought to be submitted to the jury, whether it was not fraudulent as to a great part. It is said, the limitation to the daughters here is not to be deemed a part of the consideration of the settlement with reference to the creditors. It is not necessary to touch upon that, if the property bore any reasonable proportion to the value of 12,000*l.* If it were necessary to discuss it, attention must be given to the cases of moral obligation, executed by a provision for persons, not the direct objects of the contract, in which that provision

[•150] * has been held such a part of the consideration as would support their interest, as well as those, with regard to whom that contract was more directly entered into.

Then as to possession, and the other circumstances, relied on at law: suppose the question arose the day after the deed was executed, and the 12,000*l.* had become under the circumstances to all intents and purposes part of the assets of Lord *Arundell*; which, I see, was questioned at the bar: suppose it proved the day after, that the property was worth that sum: could it have been contended, that for want of publicity, of an inventory, of possession, considering the nature of the subject, and the relation, in which the parties stood, this would not have been a deed, the trusts of which must have been executed

executed for Lady *Arundell*? If it is contended, that the deed was originally fraudulent, because no consideration was paid, or what a Court of Law would call colourable, all subsequent facts and enjoyment tell forcibly, connected with the objections to the deed, at the time of execution. They are evidence in the other case; but such, as, when the value is appreciated, ought to be stated to the Jury, to be weighed, regard being had to the law, if the question had occurred immediately after the execution. The circumstances of not informing witnesses, the steward, &c. would not have weighed with me; as they are circumstances in almost every transaction of this nature; and therefore not so unusual as to afford a fair ground of suspicion. Then, as to the nature of the possession, what is the publicity to be? Suppose, there were no trustees; but an agreement, without the interposition of trustees, by a covenant, that this property upon the wife's advancing 12,000*l.* to the creditors of the husband should be to her separate use. The nature of the transaction must have left the legal property in the husband; and I doubt extremely, * whether that could be a fraudulent possession, even in a Court of Law. Clearly it would not here. Suppose, this had been before marriage; and these articles had been settled as heir-looms; and it is exactly the same, if after marriage, and for valuable consideration: what is the publicity, shewing, they are heir-looms? What is the nature of the property, and the sort of possession naturally to be looked for? When Lady *Arundell* was making a settlement for the benefit of her daughters, afterwards in all probability to enjoy the possession of this ancient family seat, there was neither legal nor moral fraud in taking the property, for which she paid the value. But the nature of the property, the relation of the parties, the circumstances, that she could have no object but to transmit it to her family, and that she must live with him, who sold it, those circumstances are very material as to the possession.

It

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It is said, Lord *Arundell* dealt with creditors, as if this was his property; and there might be a considerable question, whether his or the steward's dealings in conversation or correspondence with creditors, as if this was part of the husband's property, is to be admitted in a question between the husband and wife; more difficult perhaps between the creditors and the sheriff: but it is extremely possible, that such a case might be laid in evidence, with reference to her acts, that the dealings of the husband might be considered a part of her conduct with regard to the property; and therefore that sort of evidence would be admissible against her. It was also stated at the bar, that she has permitted a creditor in more instances than one to take execution out of this property. That is a very material fact; but to be stated with some qualification. It is evidence, that she did not believe the property to be her's; but not conclusive evidence. She might let part of her own property go to \* discharge a particular debt, by which she saw her husband pressed. That fact therefore ought to be examined, before it can be considered as having much influence one way or the other. It is very difficult to find the means of taking the opinion of a Court of Law in this particular case.

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The Order was, that it should be admitted, that the Sheriff returned *Nulla Bona*; that an action should be brought in the Court of Common Pleas for that return; and Lady *Arundell* and the trustees should be at liberty to defend it.

WHITBREAD v. LORD ST. JOHN.

1804.

Aug. 7th, 15th.

**SAMUEL WHITBREAD** by his Will and Codicil bequeathed 12,000*l.* to trustees, upon trust, that they should lay it out upon Government Securities; and should apply the interest towards the education of all the children of his daughter *Lady St. John* during their respective minorities, as the trustees should think proper, until such children should respectively attain the age of 21 years, or be married with consent of their guardians; and upon farther trust, that the trustees should assign, transfer, and pay, the principal, or so much as should not have been applied in or towards the education of his said grand-children, unto and among the child and children of his said daughter by *Lord St. John*, born or to be born, as many as there might be, in equal shares and proportions, when and as the said grand-children should attain their respective ages of 21 years, or be married with consent, &c. and in case any or either of his said grand-children should happen to die, \* before he or she should have attained his or her age of 21, or be married, &c. the share of him or her dying should go to the survivors of them, his said grand-children, at his, her, or their, ages of 21 years, or marriage, &c. in equal shares, if more than one; and, if but one of them, his said grand-children, should live to attain 21, or be married, &c. the whole should go to such only surviving grand-child, &c.; and in case all his said grand-children should die before their ages of 21 or marriage, &c. upon trust to pay the principal and interest, or so much as should not have been applied in or towards the education of all or any of his said grand-children, to his son *Samuel Whitbread*.

Bequest to the children of *A.* born or to be born, as many as there might be, at twenty-one or marriage, with survivorship, and a Limitation over upon the death of all, &c. vested in those living, when one is entitled, to the exclusion of those born afterwards.

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There were four children of *Lord and Lady St. John*. The two eldest, daughters, having attained the age of 21,

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21, and one of them being married, presented a petition for payment of their respective fourth shares of the trust-fund.

Mr. *Leach*, in support of the Petition.

Mr. *Alexander* and Mr. *Bell*, against it, admitted, that Lord *Thurlow* in *Andrews v. Partington* (57), and Lord *Rosslyn* afterwards in *Prescott v. Long* (58), held themselves bound by *Ellison v. Airey* (59); but observed, that rule was adopted with reluctance; and is not to be followed, if there is any ground of distinction; as they insisted there was in this Will. The testator could not intend this fund to go over, if there were any children.

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The Lord CHANCELLOR.

It never could go over, if any child attained the age of 21. I rather think, it will turn out, that it is confined *ex necessitate*. The Court goes as far as it can to comprehend every one, until one attains the period, at which that one can take a share. I will look through the cases.

The Lord CHANCELLOR.

Aug. 15th.

I cannot take this case out of the authorities. Therefore the shares vesting, when the first child attains the age of 21, and there being now four children, the Order must be made upon that principle (60).

(57) 3 *Bro. C. C.* 401.

and the references, 348; and

(58) *Ante*, Vol. II, 690.

the note, I, 408.

Mills v. Norris, V, 335. *Bar-*

(59) 1 *Ves.* 111.

rington v. Tristram, VI, 345,

(60) *Gilbert v. Boorman*,

post, Vol. XI, 238.

END OF THE SITTINGS AFTER TRINITY TERM, 1804.

THE SITTINGS BEFORE
MICHAELMAS TERM,

45 GEO. III. 1804.

NICHOL v. GOODALL.

1804.

Oct. 30th.

A MOTION was made for an Injunction, to restrain the Defendants, part-owners of the *Catherine* and *Mary*, a *British* privateer, from receiving from the other Defendants *Jenner* and *Wheeler* any of the money, granted by his Majesty to the owners, captain, and crew, in respect of the proceeds of the *Cornelius* and *Maria*, a *Dutch* ship, taken by the privateer, under any warrant or authority; that *Jenner* and *Wheeler* may be restrained from paying the other Defendants; and may be ordered to pay the whole into the Bank.

Sentence in the Court of Admiralty, upon a prize to a privateer, as a *Droit* to the Crown, for want of a Letter of Marque. The property is in the Crown.

The Plaintiffs were assignees under a Commission of Bankruptcy against one of the part-owners, who was also agent to the privateer. One of the Plaintiffs was also himself a part-owner. The Defendants were the other part-owners; one of whom was *Goodall*, the captain; and *Jenner* and *Wheeler*; who exercised the office of Register of the Court of Admiralty. The circumstances, under which the suit was instituted, and the motion made, were these.

Motion, to restrain the parties from receiving, and the Register of the Court of Admiralty from paying, the proceeds under a Treasury Warrant, refused, with

In Costs.

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In *June* Captain *Goodall* detained, and brought into *Plymouth*, as prize, this *Dutch* ship; which upon her arrival was seized by the Admiralty; and, a suit being instituted in the Court of Admiralty, the sentence declared, that the ship was a *Droit* to his Majesty; and was not a legal prize to the privateer, by reason of her not having a Letter of Marque against the *Batavian* Republic at the time of the capture. A memorial being presented to the Lords of the Treasury, they issued a warrant to the Register of the Court of Admiralty, to pay to *Jarratt*, the agent, and *Goodall*, 23,000*l.*; being two-thirds of the proceeds, for themselves and the rest of the owners and crew. Nothing was received under that warrant: disputes arising; particularly upon *Jarratt's* claim of Commission, as agent, which was resisted by *Goodall*; and upon *Jarratt's* bankruptcy. The Register of the Court of Admiralty refused to pay. In consequence of this another memorial was presented; and a second warrant obtained by *Goodall* and *Martin*, another of the owners, to receive the money; reserving the shares of the Plaintiffs.

Mr. *Piggott*, Mr. *Richards*, and Mr. *Wetherell*, in support of the Petition. The *Attorney General*, Mr. *Romilly*, and Mr. *Roupell*, against it.

*The Lord* CHANCELLOR.


This is a motion of the first impression; to restrain these Defendants from receiving from the Register of the Court of Admiralty any part of the money, granted by the King to the owners, captain, and crew, of this privateer, in respect of the proceeds of a prize, under any warrant or authority whatsoever. The motion not only seeks to restrain those Defendants from receiving, but desires this Court to enjoin the officers of the Court  
 \* of Admiralty, called upon by the King's warrant to do an act, against obeying that warrant, and to order them  
 to

to pay the whole money into the Bank, till the cause shall be heard, and the accounts taken. The articles determine nothing as to the interests of the parties, as to the question, whether they should have any right whatsoever in the property so captured, for the purpose of application, discharge of the expences, or any other purpose. When the prize is condemned, whatever has been the habit of the Crown, however that habit may create a reasonable expectation, which upon the ground of an assertion, made from the highest authority, that the Crown never does disappoint that expectation, has been held an insurable interest, no Court is authorised to look at the property as any other than as belonging to the Crown; and it would militate against the policy, for which the right is vested in the Crown. The title, with reference to antecedent charges, by loan, commission, and every claim, that can precede the distribution, must depend upon the question, how far the King's grant has or has not adopted, as its rule for determining the rights of the parties, those provisions, which the parties have assumed for themselves; if their rights are to be determined by contract between themselves. If the Crown can by one warrant revoke a former warrant, I believe, it would be such a surprize upon those, who advised the King to grant this last warrant, to learn, that the money belonging to all the other part-owners, and the seamen, the most deserving of all, would be brought into this Court, to abide what must take place here, that the statement of the fact, that this Court had taken jurisdiction, would in all probability produce a third warrant. Upon the first application the interests of the seamen and part-owners, and all antecedent claims and expences, were not considered by *Jarratt* and *Goodall*, or *Nicol*, now a Plaintiff. \* But, without attending to that objection, the first warrant directed payment of two-thirds of the proceeds to *Goodall* and *Jarratt*, to be distributed according to the articles.

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The expectation, arising from the habit of the Crown as to Prize, has been held an insurable interest.

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articles. The first question upon that is, in what stage this Court is upon the head of trust to interpose. Is the Court to interpose by restraining the Register from obeying the warrant, the King having the property? Is the Court to interfere in the Court of Admiralty; and to lock up the fund, or require it to be paid into this Court? They are not trustees, until they have received it according to the King's Order. Passing over the first warrant, another application to the Crown took place; upon the ground, that it was unfit to make the bankrupt the hand to receive the money, to be distributed; and the alteration made was, that the former warrant should in effect be revoked, and a grant should be made to *Goodall* and *Martin* of all the proceeds the bounty of the Crown gives to any of them; except these shares or interest, whatever they may be, which belonged to the others. If the property was the King's, what is to prevent his Majesty from saying, who should be the person to settle the questions of difficulty, which probably were foreseen. There is a qualification of the Order to the Register; which would protect him upon that. By the articles the seamen, &c. are not to receive, or to begin process to obtain, the money, until three months after it shall have been in the hands of the agent; and the second warrant is thus qualified; that the Register shall take the direction, and persons suggesting interests, shall have the benefit of calling upon the discretion, of the Judge of the Court, to decide their claims. As to Commission, it is every day's practice for them to inquire as to the outfit, expences, charges, damages, &c. These, by the very terms of the warrant, are to be so decided; and that Court is to ascertain the shares, after that decision to be paid out to the owners, officers, and seamen. These also are decisions the Court would have authority to review over and over again; and the warrant expressly directs them to take bail. That applies to all the part-owners; a security therefore for all demands.

demands. Is this Court then, before a trust is created under the King's warrant, to issue an injunction in such a case?

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The Motion was refused with Costs.

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WILLIAMS v. WYNN.

**M**R. JOHNSON, for the Plaintiff, moved for an Order to transfer some Bank Annuities; and that a guardian may be appointed for an infant Defendant: as to the latter object of the motion suggesting a doubt, whether it could be obtained upon the application of the Plaintiff; though, if right in form, there could be no objection.

1804.  
Oct. 30th.  
Order, appointing a Guardian for an infant Defendant, on the motion of the Plaintiff.


*The Lord CHANCELLOR* thought, there was no objection; and made the Order.

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NUTBROWN v. THORNTON.

**T**HE Plaintiff held a farm from the Defendant, under a lease for seven years, at the annual rent of 1000l.; and it was agreed, that the Defendant should farm, seized by the landlord under a distress and bill of sale; the landlord not stating, whether the sum, under which by the terms of the contract he was not to enforce his remedies, was due.

1804.  
Oct. 31st.  
Order specifically to restore to a tenant the stock, &c. on the

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make advances, to enable the Plaintiff to cultivate the farm, to the extent of 500*l.*; for which sum it was agreed he might be in arrear until the expiration of the lease; and if the arrear should at any time exceed that sum, the landlord should be at liberty to enter, and sell all the cattle, crops, and personal estate, upon the farm. Disputes arising between them, the Defendant entered upon the farm, and took possession of all the Stock; with a view to put in force his remedy by bill of sale; upon which the bill in this cause was filed, for an injunction; insisting, that the stipulated sum was not due; and, the answer not stating what was due, an Order was made in *August*, that the possession of the stock and effects in the bill of sale should be restored to the Plaintiff, for the purpose of getting in the growing crops, and cultivating the farm.

Mr. *Fonblanque* and Sir *T. Turton*, for the Defendant, moved to discharge that Order; insisting, that there is no instance of a decree for the specific delivery of chattels, where a compensation may be made in damages: *Cudd v. Rutter* (61). *Errington v. Aynesly* (62). In *Fells v. Read* (63), Lord *Rosslyn* went upon express trust. This is the pure unmixed case of a tenant, coming to be relieved against the legal remedy of the landlord by distress; which, as well as the collateral security by the bill of sale, is taken away by the effect of this Order.

Mr. *Romilly*, for the Plaintiff, was stopped by the Court.

*The*

(61) 1 *P. Will.* 570.

(62) 2 *Bro. C. C.* 341.

(63) *Ante*, Vol. III, 70;

see the note, 73. *Lady Arundell v. Phipps*, *ante*, 139.

*The Lord* CHANCELLOR.

It is now perfectly settled, that this Court will not enforce the specific performance of an agreement for a transfer of stock: but in a book I have of Mr. *Brown's* I see, Lord *Hardwicke* did that (64).

In *Ward v. The Duke of Buckingham*, in the House of Lords, upon a lease of alum works, with a covenant by the lessee to leave stock of a certain amount upon the premises, there was a fair ground of suspicion, that he did not mean to perform his covenant in that respect; and this Court said, though there might be compensation in damages, it had relation to that sort of enjoyment, for which the landlord had stipulated after the expiration of the term; and a sort of decree, *quia timet*, was made; and affirmed in the House of Lords (65).

I am not dissatisfied with the principle, upon which I interposed in this case, which is very peculiar in its circumstances; and there is no instance precisely resembling it. This contract is very singular; though I take it there was no fraud; for, first it made it impossible, that the tenant should remove any cattle from the premises; though the terms require, that he should be a dealer in cattle; for it is an assignment of all the cattle, stock, and personal estate; and the landlord was to be at liberty to enter, and sell all this in the event provided. The circumstance of a trust, by way of deposit, as in *Fells v. Read*, is not required in this instance, to furnish the principle, upon which the Court might be called upon to interpose; for the law would make

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No specific performance of an Agreement for a transfer of Stock.  
Decree against a lessee of alum works, to prevent a breach of a Covenant to leave Stock of a certain amount at the expiration of the lease.

(64) See *Dolaret v. Rothschild*, 1 Sim. & Stu. 590.

*v. Shelton*, ante, Vol. V. 147, 260, n. and the note; 147.

(65) *Sir William Pulteney*  
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make him a trustee; and by the express contract he would be so. The simple ground of this bill is, that the tenant bargained for the enjoyment of the farm, for the purpose of agriculture; and in fact for the enjoyment of the stock for seven years; for that must be the effect of his stipulation to be debtor to his landlord during the term; who might otherwise lay hold of it for the rent, and, under the bill of sale, for other money due; and he was debtor on other accounts. There is no doubt, at the hearing, if the landlord had entered without right, the Court would have restored the estate for the remainder of the term; and finding the person, who had wrongfully taken possession of the farm, in possession of the stock, at the same time, and under the effect of the same wrong, would undoubtedly have made him account for and deliver back the whole. The bill proceeds upon the ground, that, when the Defendant took possession under the Bill of Sale, and, as landlord too, I will take it, the Plaintiff did not owe upon all accounts the money stipulated. By the answer the Defendant does not, as he ought, distinctly state, whether that sum was due, or not; and, having had liberty to file an affidavit as to that fact, an argumentative affidavit, not by himself, but by another person, is produced. I admit, it is dangerous to interfere *brevi manu* between landlord and tenant; and I would not, if a clear, distinct, affidavit was produced, that the particular sum was due. I interpose upon the ground, that the Defendant and his agents will not swear, what sum is due. If the result of the inquiry was, that so much was not due, I must have restored the farm. But I should not do justice by restoring the farm; leaving him to dispose, as he insists he may, of all the stock, crops, &c. even the growing crops. If the Defendant had not a right to take possession of these chattels, the title to enjoy which forms part of what was acquired under the contract, his right to take

take possession of them, depending upon the same question as his right to take possession of the farm, he is by his own agreement a trustee of both, taking a possession he is not entitled to hold. I had some difficulty upon this; that, though so much might not have been due at the time, there was a large growing rent, which would soon exceed that sum; and as to the rent accrued due, after the Defendant took possession, if it should turn out, that he had no right to take possession, whether in some way the tenant might not deduct the damage suffered by that wrongful act from the rent. The Order therefore gave them liberty to apply.

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I had not forgot the case of the *Pusey Horn* (66); which turned upon the *pretium affectionis*; independent of the circumstance as to tenure; which could not be estimated in damages. As to *Fells v. Read*, the objection, to which no answer was given, was, who were the *Cestui que trust*? Individuals sued, who did not pretend to say, the box belonged to them. The overseers were gone. Lord *Rosslyn* however thought, he saw a trustee and a *Cestui que trust*; and those got the chattel, who ought to have had it. But this is the case not of a single chattel, unconnected, but of a great variety of chattels, which must be held upon a trust together with the estate. There is therefore a *Cestui que trust*. Upon the particular circumstances also the Court would be justified in interposing, to prevent the destruction of the property, until the rights were ascertained, upon the principle of irreparable mischief. It is said, the Plaintiff might have damages. But how are damages to be estimated in such a case? The direction to a jury must be to give, not the value of these chattels merely, but their value to this man, having this farm, enabling him to use them for the purpose of cultivation; and the very terms of the contract shew, the landlord, dealing

Jurisdiction for specific delivery of a chattel, the value of which is not to be estimated by damages.

(66) *Pusey v. Pusey*, 1 Vern. 273.

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 v.  
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 [ \*164 ]

dealing with him, thought him not able to stock the farm without a very large indulgence through the whole term. The equitable construction is, that the tenant is to have possession of the stock; which he is to purchase by a loan from the landlord, who is not to call for repayment until the end of the term. It is therefore an entire contract for the estate and the chattels; the enjoyment of the latter being requisite for the enjoyment of that estate. Upon the whole, I think the principle of the Order right.

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 Nov. 3d.  
 Writ of *Ne exeat Regno*, a high Prerogative writ, originally applicable to purposes of State; afterwards extended to private transactions; confined to cases of equitable debt.  
 The affidavit must be as positive as an affidavit to hold to bail: information and belief admitted only upon matter of pure account, as between partners and executors.

### JACKSON v. PETRIE.

A MOTION was made for a writ of *Ne exeat Regno*. The case, as represented by the bill and affidavit, was, that several years ago two *West India* merchants, in partnership, became bankrupts; but were left in the management of their property, and became entitled by purchase to an estate in the *West Indies*. The Defendant, a creditor by a promisory note for 1800*l.*, far short of the value of the estate, a great many years ago brought the estate to a judicial sale in the *West Indies*, and purchased it for 10,000*l.* currency; suggesting, that the sale was fraudulent, and would be set aside; and the Defendant, therefore, liable to account for the rents and profits: or, otherwise, that according to the information and belief of the Plaintiff only 2000*l.* of the purchase-money was paid; and therefore the Defendant was debtor for the residue. The motion was made at the sitting of the Court; on the suggestion, that the Defendant

The application ought to be as prompt as possible.

Jurisdiction here upon contracts as to an estate in the *West Indies*.

Defendant was on board a ship, to sail on this day for the *East Indies*; and the bill was filed on the same morning.

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PETRIE.

Mr. Owen, for the Plaintiff, in support of the jurisdiction, cited *Lord Cranstown v. Johnson* (67), *Archer v. Preston* (68), and *Lord Arglasse v. Muschamp* (69).

*The Lord CHANCELLOR.*

I was startled by this application; for, though, it is true, a necessity frequently exists for the application of this writ, almost amounting to surprize, the Court is peculiarly bound to see, that a case is made for that sort of interposition, to stop a person going abroad, and to sail this day: let the consequences to him be what they may (70). However great the difficulty upon the Plaintiff, generated by circumstances, which would have great weight at the hearing, to make the affidavit as precise and pointed, as the rules of the Court require, that is his misfortune; and I can no more grant this writ on account of that difficulty, than a Judge can order bail upon an insufficient affidavit. The affidavit must be as positive as to the equitable debt, as an affidavit of a legal debt, to hold to bail.

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There is no doubt of the jurisdiction upon contracts as to land in the *West Indies*, if the persons are here. With reference to the doctrine of bail in trover and assault, upon which a discretion to hold to bail for damages has been habitually exercised at law, that is more justifiable

(67) Ante, Vol. III, *White v. Hall*, post, XII, 321.

(68) 1 *Eq. Ca. Ab.* 133, cited 1 *Vern.* 77.

(69) 1 *Vern.* 75.

(70) Ante, Vol. VIII, 33. Upon this writ see the notes, I, 95; IV, 592, and Mr. Beames's Brief View of the Writ.

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justifiable in the case of trover, where there is some standard for ascertaining the value, than in the other case, *a Tort*, for which the damages depend upon the discretion of the Jury. But I am not aware, that this high prerogative writ, originally applied only to purposes of State, and afterwards extended to private transactions, has been granted, except in cases of equitable debt: nor do I recollect, that this Court has granted the writ upon an affidavit, stating merely information and belief as to the amount of the debt; except where it is matter of pure account. The ordinary case, following a precedent, and a bold precedent by Lord *Hardwicke* (71), is the case of partners and executors; upon which information and belief is held sufficient. If the foundation of the Equity in this case is the alleged fraud, not particularly stated, but only upon information and belief, considering therefore, that at some period the contract will be set aside in this Court, and the purchaser will therefore become a debtor for the rents and profits, it is beyond all sight to grant this writ in such a case. Upon the other ground, taken by the bill, the affidavit must be more positive. It probably will happen, that the refusal of the writ in this instance may finally operate to create injustice. But the answer is, that I cannot act otherwise than the rule and principle, practice and usage, of the Court authorize; and there is no instance of granting the writ upon such circumstances. It must also be observed, that, though the Court will act promptly upon this application, almost amounting to surprize, care must be taken, that the application is made as promptly as possible; and this application might have been made a fortnight ago.

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The Writ was refused.

(71) *Rico v. Gaultier*, 3 *Atk.* 501.

LADY LINCOLN v. PELHAM.

1804.

Nov. 3d.

**L**ADY *Catherine Pelham* by her Will, dated the 1st of July, 1775, bequeathed out of her money in the funds and debts due to her on bond at the time of her death, to *Henry Duke of Newcastle*, the sum of 4000*l.*, to *Lewis Lord Sondes*, the sum of 4000*l.*, and to her daughter *Lady Sondes*, and her daughter *Mary Pelham*, 2000*l.* a-piece; and she gave and bequeathed all the residue of the money in the public funds, which she should be possessed of at her decease, and the money secured by bond, to her executors, in trust, to pay an annuity of 30*l.*; and upon farther trust, that her daughter *Frances Pelham* might receive the yearly interest, dividends, and produce, of such residue during her life, for her own use and benefit; and after her decease, in trust, to pay one-fourth part of such residue to the younger children of the said Duke of *Newcastle*, by her late daughter *Catherine*, equally to be divided between or among them; and one other fourth part thereof to or among the younger children or child of her daughter, the said *Grace, Lady Sondes*, equally to be divided between or among them, if more than one; and to pay one-fourth part thereof to the children or child of her said daughter *Frances Pelham*, equally to be divided between or among them, if more than one, share and share alike; and upon further trust, that her said daughter *Mary Pelham*, might receive the yearly interest, dividends, and produce, of the remaining fourth part during her life; and that after the decease of the said *Mary Pelham*, the same might be paid to the children or child of the said *Mary Pelham*, equally to be divided between them, if more than one, share and share alike; and if either of her said daughters *Frances Pelham* and *Mary Pelham* should die without any issue of her body begotten, living at her death, or, there being any

Construction of a Will; that under [\*167] a Bequest to the younger children of A. an only surviving younger child, was upon the whole Will entitled; and the second, having become the eldest, was excluded. Vested interest in legatees, who died during a previous interest for life. Bequest of one fourth to the children of A., and one other fourth to or among the children of B. Distribution per Capita.

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any such child or children, if all of them should die before the ages or times, when their shares were made payable, as therein mentioned, then the fourth part of her said two daughters as should so die without leaving any issue, or whose issue should so fail, should go to * the children or child of the other of her said daughters, to be equally divided between them (if more than one), share and share alike; and if both her said two daughters, *Frances Pelham* and *Mary Pelham*, should die without leaving any children or child living at their deaths, or there being any such children or child, if all of them should die, before any of them, being a son or sons, should attain the age of 21 years, or being a daughter or daughters, should attain that age, or marry, then and in such case she willed, that the said two last-mentioned fourth parts should be equally divided amongst the younger children of the said Duke of *Newcastle*, by her said daughter, and the younger children of the said Lady *Sondes*; and she left to Lord *Lincoln* and *Lewis Watson*, her grandsons, 100*l.* a-piece for a ring; and she appointed *Frances Pelham* and *Mary Pelham* executrixes of her Will; and gave and bequeathed all the residue of her goods, chattels, and personal estate and effects, (not before disposed of) to her said two daughters, *Frances Pelham* and *Mary Pelham*, equally to be divided between them, share and share alike, subject to the payment of her debts, &c.

The testatrix made a Codicil, dated the 13th of *February*, 1780, whereby she revoked and made void the said legacy of 4000*l.* given by her said Will to the said Duke of *Newcastle*; and she by her said Codicil in all other respects ratified and confirmed her said Will.

The testatrix died in *February* 1781. By the decree, pronounced upon the original bill, filed by Lord *John Pelham*

Pelham Clinton, one of the younger children of the Duke of *Newcastle*, the accounts were directed; and by another decree, made on farther directions, it was ordered, that the interest of the residue of the funds should be paid to *Frances Pelham* during her life, with liberty to apply upon her death. After her death an inquiry was directed as to the children of *Henry Duke of Newcastle* and *Lord Sondes*; and whether *Frances* and *Mary Pelham* died unmarried and without issue.

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of the testatrix, and wife of *Henry Duke of Newcastle*, died on the 27th of *July*, 1760; and Lady *Sondes* died on the 31st of *July*, 1777. Lady *Sondes* had the date of the • Will and Codicil and at the death of the testatrix three sons, all living, and no other children.

Upon the death of *Frances Pelham* three petitions were presented: the first by the Plaintiffs, executors of Lord *John Pelham Clinton*; praying a transfer of one moiety of the funds: the second by the executors of *Thomas Duke of Newcastle*; praying a transfer of one-fourth; and the third by the two younger sons of Lady *Sondes*: praying a transfer to them in equal moieties of three-fourth parts; and by the executors of *Mary Pelham* and the administrator of *Frances Pelham*, for a transfer to them respectively, in equal moieties, of the remaining fourth.

These Petitions were argued by Mr. *Romilly*, Mr. *Fonblanque*, and Mr. *Steele*, for the Plaintiffs, executors of Lord *John Pelham Clinton*: Mr. *Richards* and Mr. *Cooke*, for the younger children of Lady *Sondes*: The *Attorney General*, for the Representatives of *Frances* and *Mary Pelham*: The *Solicitor General*, Mr. *Piggott*, and Mr. *Leach*, for the Representatives of *Thomas Duke of Newcastle*.

Upon the question, whether the interests were vested, and the distribution only postponed till the death of *Frances Pelham*, the point was given up by the children of Lady *Sondes* as to the fourth, given originally to the younger children of the Duchess of *Newcastle*; admitting, that was vested. But against that construction as to the two-fourths, given over upon the failure of issue of *Frances* and *Mary Pelham*, *Hall v. Terry* (72), and *Moorish*

(72) 1 *Atk.* 502.

ish v. Strong (73) were cited; which were distinguished by
 • the children of the Duchess of *Newcastle*: the former,
 as being as a legacy payable out of land: the latter
 depending upon an express contingency, a second mar-
 riage; in the nature of a condition precedent. *Barnes*
v. Allen (74) was cited as an authority for vesting.

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Upon the point, that *Thomas Duke of Newcastle* was  
 entitled as a younger child, though he afterwards became  
 the eldest (75), *Hall v. Hewer* (76), *Coleman v. Sey-*  
*mour* (77), and *Duke v. Doidge* (78) were relied on; and  
 it was insisted, that the distinction taken in *Chadwick*  
*v. Doleman* (79), and *Lord Teynham v. Webb* (80),  
 where the provision comes from a parent, or a person  
*in loco Parentis*, was not applicable: Lady *Catherine*  
*Pelham* sustaining neither of those characters; and the  
 father being alive.

*The Lord CHANCELLOR.*

Though it is impossible in these cases to be sure of  
 hitting the intention, there is but one part of the decision,  
 upon which I have any considerable doubt, whether it is  
 according to the real intention of the testatrix. She  
 had four daughters: Lady *Catherine*; who had been  
 Duchess of *Newcastle*; and was dead at the date of the  
 will; by whom the Duke of *Newcastle* had three chil-  
 dren,

(73) At the *Rolls*, 8th July,  
 1775, before Sir *Thomas Sew-*  
*ell*. Cited from a note of  
 Lord *Kenyon*.

(74) 1 *Bro. C. C.* 181. See  
 the case stated from the *Re-*  
*gister's Book*, ante, Vol. III,  
 208, in *Perry v. Woods*. *Roe-*  
*buck v. Dean*, II, 265; and  
 the note, 267.

(75) *Bowles v. Bowles*, the  
 next case. *Matthews v. Paul*,  
 3 *Swanst.* 328.

(76) *Amb.* 203.

(77) 1 *Ves.* 209.

(78) 2 *Ves.* 203, n.

(79) 2 *Vern.* 528.

(80) 2 *Ves.* 198,


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dren, then living: Lord *Lincoln*, Lord *Thomas Pelham Clinton*, and Lord *John Pelham Clinton*. Lady *Sondes*, another daughter of the testatrix, had also three children; and was then alive; and therefore might have other children by that marriage, or future marriages. There were also two daughters unmarried. The two *former being married to Peers, the eldest son of each must succeed to that dignity, and in all probability to a considerable fortune. It was possible, the other two might not marry persons of similar condition; and therefore it occurred to her to make a different provision for them. This is the case of a grandmother, making this provision for those, who in a sense constituted her family, with reference to the actual circumstances, in which the different persons, most forward to her affections, stood.

The first disposition is, that her daughter *Frances Pelham* shall have the interest of the residue for her life, and after her death one-fourth of the residue shall be paid to the younger children of the Duke of *Newcastle* by the testatrix's late daughter *Catherine*, equally to be divided among them. Another fourth is given to the children of Lady *Sondes*, in terms somewhat different, but meaning, I think, exactly the same: "to or among
 " the younger children or child of Lady *Sondes*,
 " equally to be divided between or among them, if more
 " than one." Lady *Sondes* had at the date of the Will more than one younger child. She might, or might not, have more; and they might be reduced to one; to answer the word "child." As to the daughters unmarried the testatrix makes a provision, not excluding any child whatsoever; and there are cross limitations among the children. It is impossible to doubt, that by the description of "younger children of Lady *Sondes*" at the end of the Will she meant the same persons, who were described in the former part. That leads me to think,
 that

that with regard to the children of those daughters, married, and to whose younger children she gave the original, and in events the accruing, fourths, her real meaning was, those answering the description of younger children at her death; and though there is in the former * part more description as to the children of Lady *Sondes* than as to those of the Duchess of *Newcastle*, the phrase as to the children of Lady *Sondes*, in the latter part being the same as in the former part with reference to the children of the Duchess of *Newcastle*, it all means the same thing. The question is, what is that? I use the peculiarity of expression for a different purpose from that, for which it was used in the argument; for I take the description of the younger children of Lady *Sondes* in the bequest of the original fourth as indicative of an intention to give to the younger children, not as identifying them in the same way as if they were named, but to such of them, if more than one, as answer the description of younger children; or to one child, if there should be only one; and she had exactly the same meaning as to the children of the Duchess of *Newcastle*. It is said, the description "younger children" must be equivalent to naming them. The answer is, that is not the natural construction. That description *prima facie* means all the children born after the first. But if she meant only to exclude Lord *Lincoln*, and that the other children should take as individuals, not by a certain quality, it was more natural, that she should have named them; particularly as in the legacy of 100*l.* to Lord *Lincoln* she describes him not, as a son, but as Lord *Lincoln*. There is no reason, why she should be taken to exclude a second son of Lady *Sondes*, having become the eldest, and not a second son of the Duchess of *Newcastle*, having become the eldest; and I cannot believe the intention to have been, that a lapse should take place as to the Duchess's children, that would not have taken place under the same circumstances as to the children of Lady *Sondes*:

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*Sondes*: for instance, if the second son had died, that one moiety must have lapsed into the residue as to the *Pelhams*; but in the family of Lady *Sondes* the other must under the words “younger children or child” have \* taken the whole. The intention was precisely the same. It is said, Lord *Thomas Pelham Clinton*, having become the Earl of *Lincoln*, must have the legacy of 100*l*. The answer is satisfactory; that it is given to an individual, described so as to exclude the possibility of any other person having the character. The share of the residue is given to persons, who may have the right, if they retain that character: not, if they do not retain it; as it is not given to them under the individual description.

As to the cases, I shall notice them but shortly; being satisfied, whatever is the principle as to parents, or persons *in loco Parentis* (81), there is no room for its application here: this grandmother executing a purpose, which as to this head of doctrine may be stated to be parental, the purpose of providing for the younger branches, of other persons certainly, but in a sense her family; and thinking, that her daughters married were sufficiently provided for; so as to make it unnecessary to consider them objects of her care. Lord *John Pelham Clinton* therefore alone answered the description she at the date of her Will intended as the description of those, who were to take at her death: that is, he was the only younger child; and to those only she meant to give that fourth. That involves the point, that the words “equally to be divided,” standing alone, have the same meaning as with the addition, “if more than one;” which makes no difference. The codicil does not much affect me; for it is indifferent, whether she made one, or not; and no stress can be laid upon the circumstance, that,

(81) 2 *Ves.* 210, in *Lord Teynham v. Webb*.

that, when making it, she knew, the second son had become Earl of *Lincoln*; for if her meaning was to give to those two, or such as should answer the description "younger children," she meant to confirm the Will in all respects; and though she knew, Lord *Lincoln* was then dead.

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Next, as to the limitation over, if *Frances* and *Mary Pelham* die without issue, there is this specialty; that those persons, who are to take, if the younger children of the Duchess of *Newcastle* and Lady *Sondes* do not take, viz. the residuary legatees, are *Frances* and *Mary Pelham*, the tenants for life, and the persons, upon the failure of whose issue those younger children are to take. The effect as to those two shares is only to give an interest for life in a fourth to each; with cross limitations, if either should leave no issue; and, if both should die without leaving any children or child, who should attain the age of twenty-one, or marry, to these younger children; whoever may answer that description; and the gift to those children, according to the principles of law, that regulate the late cases, is vested: the contingency being of a species, that does not prevent the vesting; but may render the interest in events not beneficial in enjoyment. With reference to *Barnes v. Allen* (82), and other cases, those are transmissible interests, capable of being divested; which would be the subject of sale and transmission of every kind. The intention was not, that, if those younger children should happen to leave children, they should not transmit to their children; when the effect would be to give the absolute interest to *Frances* and *Mary*, as residuary legatees.

Upon the next question, whether the distribution is to be *per Stirpes* or *per Capita*, I am not quite sure, that
 my

(82) 1 Bro. C. C. 181. Stated from the Register's Book, ante, Vol. III, 208, note, in *Perry v. Woods*.

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The rule of distribution *per Capita* applied to a bequest to a brother and the children of a deceased brother; though under the Statute they would have taken *per Stirpes*.

my opinion is not against the intention. If there is a settled construction, founded upon cases decided, applying to the terms used, it is better to adhere to that settled construction, though I may entertain some doubt, whether it is according to the intention, than upon grounds, on which I cannot rest in every view of the case, to come to a decision, having a tendency to shake that, which forms a rule of construction; and which may in practice have been acted upon in many cases. It is clear, that if this had been a bequest to the younger children of two persons, equally to be divided between and among them, the division would be *per Capita* (83). That rule has been applied in many instances, upon which doubts have been strongly raised; for instance, a gift to a brother and the children of a deceased brother; who without a Will would take *per Stirpes*: yet it has been held, that, though the law would have given it in moieties, that is not the effect of an express bequest. With a strong disposition to think, a family division was meant, it strikes me, that the repetition of the words "the younger children," will prevent that construction. If no decision has established it, that construction is very difficult; for a bequest to the younger children of *A.* and to the younger children of *B.* means the same exactly as a bequest to the younger children of *A.* and *B.* The particular circumstances are very strong to raise conjecture and doubt as to the intention: but do they, by the inference arising from them, overpower the settled construction of the words? It is said, the testatrix meant to give a fourth to each class. The proposition, that she meant to give so in all events, is opposed by the fact, that if *Frances* or *Mary* had children, they would have taken half. It is true, the testatrix may have meant the children of Lady *Sondes* and the Duchess of *Newcastle* to take equally. It is clear, as to the manner, in which the children were to take, that under the effect of

(83) 1 *Ball & Beat.* 486.

of the Will would be different; for the children of the Duchess would have taken the original fourth as tenants in common; and so would the children of Lady *Sondes*. \* But under the bequest of the residue they would not take in the same manner; for though it is a tenancy in common between the two classes, yet the moieties, so taken as tenants in common, would go to the children respectively as joint-tenants. A different interest therefore would be transmitted in those subjects, taken as tenants in common. But can I necessarily infer from the intention with reference to property, not subject to any contingency whatsoever, that must come to them, when the lives should be spent, that the testatrix must have the same intention as to property to come upon a great variety of contingencies, which might never take place. It is not an irrational purpose to impute, that she left them to take their chance as to that. Whatever the actual intention may have been, the legal effect is a distribution *per capita*; and I cannot safely draw an inference from the other part of the Will; introducing distinctions, tending to shake the settled doctrine.

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Therefore Lord *John Pelham Clinton* is the younger child: the interests are vested; and the distribution must be *per capita*.

BOWLES v. BOWLES.

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Construction,  
younger chil-  
dren of A. a

**HENRY BOWLES** by his Will gave, among other legacies, the sum of 40,000*l.* to his sons *George* and *Charles*, and the survivor, his executors, &c. upon bequest to the trust, that under a younger child of A. a second son of three at the death of the testator and the tenant for life, who became the eldest before the age of twenty-one, till which it was subject to survivorship, was upon the whole Will not entitled.

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[ \* 178 ]

trust, to pay the interest thereof to his wife for her life; and from and after her decease upon trust to pay one-third part of the said sum of 40,000*l.* unto his son *Charles*, one other third to his son *James* his children; and as for the other third part he directed, that his trustees should put out at interest 4500*l.* for the benefit of his grandson *William*, and 5500*l.* for the benefit of his grandson *George*, both sons of his son *William*; with benefit of survivorship, in case either should die before attaining his age of 21 years, and without lawful issue; and as to what remained of this third part the testator gave the same to his said son *William* absolutely at the decease of his wife.

The testator then reciting, that he was in possession of certain fee-farm rents, of the annual value of 296*l.* 19*s.* 4½*d.* gave the same to his said sons *George* and *Charles*, their heirs and assigns, upon trust to permit and suffer his daughter *Margaret* to receive and take the same to her own use, for and during the term of her natural life; and proceeded thus:

“ And from and after her decease on farther trust  
 “ to receive the same rents; and to pay and apply so  
 “ much and such part thereof as they or the survivors  
 “ or survivor of them in either their or his discretion  
 “ shall think prudent, for and towards the better education and advancement of the eldest or only son for  
 “ the time being of my son *William*, until such eldest  
 “ or only son shall attain his age of 21 years; and the  
 “ residue or overplus of the said yearly fee-farm rents  
 “ during the minority of such eldest or only son for the  
 “ time being shall accumulate for the benefit of such  
 “ eldest or only son; and be paid to him at his attainment of 21 years; and when he shall have attained  
 “ that age, then I give and devise the said fee-farm  
 “ rents, together with such overplus or savings unto  
 “ such

" such eldest or only son, his heirs, executors, admi-  
 " nistrators or assigns. But in case my son *William*  
 " \* shall have no son, who shall live to attain the age of  
 " 21 years, then I give and devise the said fee-farm  
 " rents, together with the said savings or surplus re-  
 " maining in the hands of my said trustees, the sur-  
 " vivors or survivor of them, or the heirs of such sur-  
 " vivor, unto my son *William*, in case he shall be living  
 " at the death of his surviving son, who shall not have  
 " attained his age of 21 years, his heirs, executors, ad-  
 " ministrators, and assigns. But if my said son shall  
 " happen to die in the life-time of my daughter *Margaret*  
 " without leaving any lawful issue, then I give and devise  
 " the said fee-farm rents to my said daughter *Margaret*,  
 " her heirs and assigns for ever."

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The testator then gave to his said sons *George* and
Charles 15,000*l.* principal money in the 4*l.* per cent. Bank
 Annuities, upon trust, for his daughter *Margaret*, during
 the term of her life; and then proceeded thus:

" And from and after her decease upon farther trust
 " to transfer 2000*l.* of the said 4*l.* per cent. Bank An-
 " nuities to my son *Charles*; and reserve in their own
 " hands 2000*l.* principal stock of the said 4*l.* per cent.
 " Bank Annuities for the benefit of my son *James* his
 " children as will be hereafter mentioned. And the
 " 11,000*l.* 4*l.* per cent. Annuities remaining to be re-
 " served in like manner for the younger children of my
 " son *William* in equal shares; whose share, if any one
 " or more die under age or minors, shall be divided
 " equally among all his surviving children."

The testator after various other devises, bequests, and
 legacies, and among them 15,000*l.* in trust " for the
 " younger children " of his son *James*, one-fourth of
 the residue of his estate to accumulate " for the
 M 2 " children "

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 [ \*180 ]

"children" of his son *James*, to be paid in equal shares at 21 or marriage, to the children of *William* in equal shares with benefit of survivorship 9000*l.*, to *George* and *Charles* 15,000*l.* Bank 4*l.* per cent. Annuities, upon trust for *William* for life, and after his decease to transfer the principal sum of 15,000*l.* in equal parts amongst his children, as they attain their age of 21, gave and bequeathed all the rest and residue of his real and personal estate in equal shares to his son *William* to *James* his children and his other son whom he should appoint executors of his Will, on condition of their acting as such.


The testator died on the 13th of *February*, 1784; at which time his son *William* had three children, then living: viz. *William*, his eldest son, and the petitioners *George* and *Henry*. The testator's daughter *Margaret* died in *December* 1785; leaving the petitioners and their eldest brother, the only children of *William*, surviving her. *William*, the eldest son, died in *June* 1788; at the age of 18 years; leaving the petitioners his brothers surviving; who attained the age of 21. A decree was made in *February* 1789; by which it was directed, that the said 11,000*l.*, 4*l.* per cent. Bank Annuities should be transferred to the *Accountant General*, to the account of the younger children of *William Bowles* deceased, subject to the contingencies in the Will.

A petition was presented by *George Bowles*, the younger, praying a transfer of a moiety of the said 11,000*l.* Bank 4*l.* per cent. Annuities; and a cross petition by *Henry Bowles* the younger; praying a transfer of the whole of the said 11,000*l.* Bank 4*l.* per cent. Annuities.

Mr. *Richards* and Mr. *Kenrick*, in support of the Petition of *George Bowles*.

This

This petitioner answered the description of a younger son at the death of the testator; and as such this interest vested in him. The difficulty, that occurred in the last case (84), does not arise in this instance; for two younger children were living at the death of the testator, and at the death of the tenant for life; and took vested interests; which are not divested. This also has not the circumstance, observed by your Lordship in that case: an honour, descending, with probably a great estate. Upon the other construction it was possible, that the second son, becoming the eldest, might be deprived of all provision: an intention, that cannot be imputed. *Coleman v. Seymour* (85). *Chadwicke v. Doleman* (86). *Beale v. Beale* (87). *Duke v. Doidge* (88).

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Mr. Romilly and Mr. Hart, for the Petitioner  
*Henry Bowles.*

This is a question of construction of very peculiar words; and not to be determined by any authority. The question is, whether the same person can take one provision as an elder, and another as a younger, child. There was no vested interest: but on the contrary an anxious caution against vesting.

*The Lord* CHANCELLOR.

If upon the true construction of this Will *William* being the eldest son at the death of the tenant for life, was to be the devisee of these rents and profits, in case he should attain the age of 21, and not, if he should not attain that age, the first question is, whether, as he did not attain 21, the second son, becoming the eldest for the time being, would be entitled in his place to those rents;

- |                                                 |                                                  |
|-------------------------------------------------|--------------------------------------------------|
| (84) <i>Lady Lincoln v. Pelham</i> , ante, 166. | (87) 1 <i>P. Will.</i> 244. <i>Pre. Ch.</i> 405. |
| (85) 1 <i>Ves.</i> 209.                         | (88) 2 <i>Ves.</i> 203, note.                    |
| (86) 2 <i>Vern.</i> 528.                        |                                                  |



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rents: for, if not, clearly he would be entitled as a younger child to the other provision. At the same time there is reason to think, the intention was not, that the same individual should be considered at the same moment, the eldest and the younger son. It is clear, the testator meant such person as should be a younger son, not at his own death, but at the death of the tenant for life of these rents and this pecuniary fund.

The Lord CHANCELLOR.

Nov. 5th.

Upon the whole of this Will there is not the least doubt as to this question. The words, which follow the devise of the fee-farm rents to the eldest or only son of *William*, make the character of the devisee shift from time to time, as the sons are removed:

“ But in case my son *William* shall have no son, who
 “ shall live to attain the age of 21 years, then I give and
 “ devise the said fee-farm rents, together with the
 “ said savings remaining in the hands of my said trus-
 “ tees,” &c. “ unto my son *William*, in case he shall be
 “ living at the death of his surviving son, who shall not
 “ have attained the age of 21 years.”

Taking that with the former part it is impossible to say, the words “ for the time being ” do not mean such eldest son as may have become so, having been a younger son. The consequence is, that the testator intended, that child, who was drawn out of the character of a younger child into that of the elder, should not have the description both of the elder and younger; but, that the pecuniary fund should go to the other. The words “ as will be after mentioned ” must be construed with reference to the subsequent part of the
 * Will, which relates to *James’s* children; not to the
 prior

prior part of the Will. Upon looking through the Will I think, that is the result of the whole of it.

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BOWLES.

Upon this judgment the Order was pronounced according to the prayer of the petition of *Henry Bowles*.

FULLER'S CASE.

1804.

Nov. 22d.

MR. *ROUPELL*, on behalf of the uncle of a bankrupt, applied by motion for liberty to present a petition to enlarge the time for the bankrupt's surrender; upon the affidavit of his uncle; stating, that he had received a letter from the bankrupt, dated on board a ship; stating, that he had entered into a regiment, which had embarked for *Gibraltar*; that the deponent immediately went to *Portsmouth*, with a view to get him discharged; but the ship had sailed. The deponent suggested, that he should be able to produce such an account of the bankrupt's affairs as would produce 20s. in the pound.

Order to enlarge the time for a bankrupt's surrender can be obtained only on the application of the bankrupt himself, by Affidavit, or the assignees.

One instance to the contrary under very special circumstances.

The Lord CHANCELLOR.

Is there any instance of an application to enlarge the time for surrender without some affidavit, except by the bankrupt himself, or with some affidavit by him as to the circumstances, that prevented his surrender? He may know of the Commission; and have gone away, hoping to withdraw his effects. I think, there was one case: but in that it was proved, he was coming to surrender to his Commission, and was taken and detained as a prisoner by the *French*: a case, in which he could not possibly make an affidavit; and he was coming to do

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 FULLER'S  
 CASE.

do his duty. I think, it has been done upon the application of the assignees: but I do not know, that it has been ever done except upon the application of the bankrupt or the assignees. A petition may be presented; and it will be better, that the assignees should join in the petition (89).

(89) See an Order to take the surrender under circumstances, that prevented it in time: post, *Ex parte Higginson*, Vol. XII, 496. Ante, *Ex parte Ricketts*, VI, 445. *Ex parte Grey*, I, 195, and the notes.

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 Trustee or the  
 next friend of  
 an infant en-  
 titled to fair  
 expences, be-  
 yond taxed  
 Costs, under  
 the head of  
 just Allow-  
 ances.

### FEARNS v. YOUNG.

**M**R. STEELE applied by Motion for the Costs of trustees as between attorney and client.

*The Lord CHANCELLOR.*

My notion upon this subject is this. Where the costs of a trustee are directed to be taxed, that means as between party and party; not in the larger way. But where a trustee in the fair execution of his trust has expended money by reasonably and properly taking opinions, and procuring directions, that are necessary for the due execution of his trust, he is entitled, not only to his costs, but also to his charges and expences, under the head of just allowances (90). Some of the Masters, I find, think, that, as these charges cannot come under the head of costs, they cannot be given under just Allowances. With regard to an infant this requires great consideration; for, as the infant himself cannot incur charges and expences, if they cannot be claimed under just allowances, and the next friend is to be at the whole expence

(90) *Crumpe v. Baker*, post, Vol. XVIII, 285. *Stewart v. Hoare*, 2 Bro. C. C. 663.

expence of the infant beyond his costs, persons will deliberate, before they accept that office (91).

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(91) See ante, *Osborne v. Denne*, Vol. VII, 424. *Amand v. Bradburne*, 2 Ch. Ca. 138. *Beames on Costs*, 135, 157.



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1804.

Nov. 27th.

PARIS v. PARIS.

**JOHN PARIS** by his Will, reciting, that by his marriage settlement he had already provided for his wife *Rebecca*, by having settled 10,000*l.* 3 *per Cents.* on her, made the following disposition of Bank Stock:

An extraordinary division of a sum of money by the Bank of Eng-

“ I leave her the dividend of 4000*l.* Bank Stock, during her life: the capital placed under the same trustees as the marriage settlement of 10,000*l.* 3 *per Cents.* after her death both sums, the 10,000*l.* 3 *per Cents.* and 4000*l.* Bank Stock, to be equally divided and paid out without reserve amongst her surviving daughters; observing the child or children of any such, that have been married, but dead, to inherit the mother's share.”

land among the proprietors of Bank Stock, beyond the usual dividend, considered as capital; and therefore not the absolute property of the tenant for life: the

The testator died soon after the date of his Will, before *March* 1798, leaving his wife and five daughters surviving.

*Lord Chancellor* following, but disapproving, the

In *September* 1804, the Bank of *England* came to a resolution, that a dividend should be made of 3*l.* 10*s.* *per Cent.* interest and profits for the half year, ending the 10th of *October* following. On the 25th of the same month another resolution was carried, that the sum of 582,120*l.*, being at the rate of 5*l.* *per Cent.* upon the capital

former decisions; and holding the circumstances, that the division was in money, not stock, and that it was to

be presumed to be profit arising in the time of the tenant for life, too slight to form a distinction.

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 a  
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capital of the Bank, be divided among the present Proprietors of Bank Stock, according to their respective interests.

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The Bill was filed by the widow of the testator and the trustees in his marriage settlement, against his daughters and the Bank, praying; that the Plaintiff, the widow of the testator, may be declared entitled to the sum of 200*l.*, the *bonus* under the last-mentioned resolution of the Bank, amounting to 5*l.* *per cent.* on the Capital Bank Stock; or, in case the Court shall be of opinion that the said sum ought to be secured upon the trusts of the Will respecting the capital, that proper directions may be given for that purpose; and that the interest and dividends may be paid to the Plaintiff *Rebecca Paris* during her life.

Mr. *Romilly* and Mr. *Steele*, for the Plaintiff.

The Defendants contend, that this sum of 200*l.* is to be considered, not as interest, but as capital, to be made productive of interest. Many decisions have been made upon this subject in this Court; all having passed in silence, except *Brander v. Brander* (92); which was a good deal considered; and a case has since been decided in the House of Lords, in conformity to that and the prior decisions. This case is distinguished in circumstances from those. First, considering it, as if no decision had taken place, there is not much difficulty. The Bank is a Joint Stock Company; which makes profit of the capital belonging to the Proprietors. Their habit since the incorporation has been to divide their profits half-yearly, according to the amount. That division has gradually increased; and for some time has been 3½ *per Cent.* That dividend has not exhausted the whole profit: therefore a division of extraordinary profit has

(92) Ante, Vol. IV, 800; see the note, 802.

has been made. All the profit, ordinary and extraordinary, arises in the same way. In *September 1804*, they make a division of *3½l. per Cent.*, and a farther division of *5l. per Cent.*; with respect to the former speaking of profit and interest: as to the latter they do not say what it is; but resolve, that such sum shall be paid to the Proprietors. The tenant for life is entitled to all profit, whether casual or ordinary. Upon other subjects it cannot be contended, that the tenant for life is not entitled to profits, though not yearly. In one case, in the House of Lords, a distinction was taken, that he was entitled to yearly, not to other, profits; and it is said, that the Court of Session held, that he was not entitled to underwood, cut at the usual times. In this country there is no doubt, he would be entitled to it. So the tenant for life of a manor is entitled to heriots, fines, forfeitures, though they are not annual. So the tenant for life of a trade is entitled to all the profits, though extraordinary. It may be objected, that these profits, though they are made payable, cannot be said to arise, during the tenancy for life. In all cases a tenant for life is entitled to the profit, not merely that has arisen, but that has become payable, during his time; as the rent under a long lease, subsisting previously, though the rent became due only the day after his tenancy commenced: so, where the rent is reserved annually, though that is not usual. So, as to underwood, the increase of several years: the tenant for life, coming into possession of the estate at the end of the ninth year, becomes entitled to all, that is cut in the tenth. The circumstance, therefore, that these dividends are only declared payable, makes no difference. The ground is, that it is impossible to ascertain, how much accrued during the time he was tenant for life. Upon the same principle he loses the whole, if he dies before the time of payment.

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In this particular case it is fair to contend, that, though all these profits did not accrue in the last year, yet they accrued, while the widow was tenant for life: her interest commencing in 1798; in which period no less than three of these *bonuses*, or extraordinary divisions, have been made. In *Brander v. Brander* and all the previous cases the division was of Stock; which, it \* was to be presumed, had arisen since the last division of extraordinary profit. In many cases it is impossible to doubt that; and yet upon this doctrine a person, who has been tenant for life fifty years, is entitled only to a dividend upon that profit, instead of the whole. Upon this argument it must depend upon the will of the Bank, whether the tenant for life, or the remainderman, shall have the benefit; for it must depend upon the form, in which they make the division. In this instance they have made two divisions; calling one interest, and not the other. It must be profit; for they do not divide capital. They ought to have made a dividend of  $8\frac{1}{2}\%$  *per Cent.* The Proprietors cannot, by the charter, have an increase of capital. They are therefore under the necessity of making a distribution of any advantage in profit or interest.

The distinction between this case and *Brander v. Brander* and the case of the Bank of Scotland is, that in those the Bank had not divided a sum of money, but had given Stock; bearing interest before the distribution; consisting of capital and of interest. That must be the ground of those decisions. The reasoning in *Brander v. Brander* is singular; for instance, comparing it to a mine unopened. The reason, why a tenant for life is not entitled to the profit of a mine unopened, is, that he cannot open it. The Bank, it is true, might have withheld this: but they have not done so; and that does not assist the question. Through the whole of that case a great anxiety against the  
 tenant

tenant for life appears. It is difficult to suggest the ground of that. Clearly by making these extraordinary dividends, the Bank have not made the half-yearly dividend they might have made. Their prudence inducing them to keep in hand a larger property than they had occasion for, and therefore to defer the dividend, upon \*what principle is the tenant for life to suffer by that prudence and caution?

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[ \*189 ]

The case in the House of Lords, *Irvine v. Houston*, in 1802, was determined upon much consideration. That arose upon an extraordinary division by the Bank of *Scotland*; and that also was a division, not of money, but of stock. That case was decided in the Court of Session, and by the law of *Scotland*; which has not all the analogies, that prevail in the law of *England*: a tenant for life there not being entitled to all the profit. In *Erskine's Institutes* (93) it is laid down, that growing timber, of that kind, which does not shoot up from the root after cutting, cops wood, &c. are not considered yearly profit, and belonging to the life-renter. In this instance the Bank having in 1799 distributed the extraordinary profit, then accrued, it is to be presumed, that they are now distributing profit subsequently accrued. The doubt therefore as to the time, when the profit accrued, is excluded; and the difficulty, upon which the other cases were decided, is removed. There is nothing in the Will indicating an intention, that profit of this kind should go to the capital.

Mr. *Piggott*, for the Defendant, was stopped by the Court.

*The Lord CHANCELLOR.*

I confess, I do not think, I can safely rest upon any distinction between this case and those, that have been determined.

(93) 1 *Ersk. Inst.* 331.



1804.  
 ~~~~~  
 PAR:1
 ~~~~~  
 PAR:2

[ 190 ]

determined. I have had great difficulty in stating the principle that led to them. But in the case from Scotland great inquiry was made as to the length, to which practice had carried the decisions here, and at the *Holls*; and, as it appeared, that it had gone to great length, the House of Lords did not think it proper to disturb that. That decision having been made by the House of Lords, the only ground of distinction in this case is, 1st, that there is great probability, perhaps moral certainty, that these profits were made during the time of the tenant for life. But that will not do; for it comes to this, that in every case, in which inquiry can determine, that the tenant for life ought to have them, they ought to go according to the result of that inquiry; and that was much considered in the House of Lords. As to the distinction between stock and money, that is too thin; and, if the law is, that, this extraordinary profit, if given in the shape of stock, shall be considered capital, it must be capital, if given as money. It would be too dangerous to distinguish this case upon those distinctions. It is true, the Bank have it in their power to give the *bonus* to the tenant for life, or not.

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The Decree was pronounced accordingly; directing the money to be laid out in the 3 *per cents.*, and the dividends to be paid to the Plaintiff for life, &c.

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1804.

### FISHER'S CASE.

Nov. 28th.

A Commission of Bankruptcy cannot be resealed, even to correct a mere clerical error, after any dealing upon it; as, if it has been opened.

**MR. RICHARDS** moved, that a Commission of Bankruptcy may be resealed, on the ground of a mere clerical mistake, in the name of one of the Commissioners.

*The*

*The Lord CHANCELLOR* refused to make the Order; referring to his former decision (94). His Lordship observed, that by altering a deed without a new stamp he should defeat the Revenue Laws. The distinction \* turns upon the point, whether there has been any dealing upon the Commission; as if it had been opened: till then it is a species of escrow. An application was made in the Vacation to have a Commission resealed; the Commissioners finding, that one of the parties had not committed an act of bankruptcy. The application was refused: first, on the ground, that the man, who had not committed an act of bankruptcy, had a right of action against those, who took out the Commission against him; and by resealing that Commission his remedy would have been defeated. The second ground was, that it would defeat the Revenue Laws.

1804.  
FISHER'S  
CASE.

[ \*191 ]

(94) *Ante*, *Ex parte Thompson*, Vol. IX, 207, and the note, 208. *Burrows's Case*, post, 286.


COOKE v. WIGGINS.

1804.  
Nov. 29th.

UPON an agreement for a separation between *Cooke* and his wife, he executed a bond to *Wiggins*, as a trustee for her, to pay 30*l.* a-year upon and during the separation. No payment having been made under the bond, and the annuity being in arrear four quarters, and the trustee refusing to put the bond in force without an indemnity, Mrs. *Cooke* by her next friend filed the bill, to have the arrears paid, and the future payment secured, and a fund appropriated for that purpose.

Mr. Decree for arrears and growing payments upon a bond for an Annuity upon separation between husband and wife: the trustee refusing to enforce the bond without indemnity.

An appropriation to answer the growing payments was refused.

1804.  
  
 COOKE  
 v.  
 WIGGINS.

[ \* 192 ]

Mr. *Piggott* and Mr. *G<sup>a</sup>. Wilson*, for the Plaintiff, contended, that the trustee was under an obligation to permit his name to be used; which was the sole object of his appointment to be trustee; that he could not expect an indemnity on the part of a married woman; and it would be as short to have another trustee appointed; that it would be unreasonable, that the Plaintiff should \*rely upon a decree for the growing payments; and a fund should be appropriated.

Mr. *Cooke*, for the Defendant, the husband, submitted to account.

*The MASTER of the ROLLS.*

There is no other agreement for a settlement than the bond to secure the annuity. That was the only settlement he ever agreed to make. It cannot be contended, that a man by granting an annuity engages to bring into Court immediately a sum sufficient to answer it. The very principle of granting an annuity is, that a man may be able to pay by degrees what he has no means of paying at once.

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The decree directed the arrears to be discharged; and the growing payments, with liberty to apply: the costs to be paid by the husband to the *Prochein Amy* and, when received, the costs of the trustee to be paid over to him (95).

(95) See ante, *Legard v. Johnson*, Vol. III, 352, and references. Post, *Lord St. John v. Lady St. John*, XI, & *Seagrave v. Seagrave*, XIII, 439.

LANE v. NEWDIGATE.

1804.

Nov. 2d, 13th.

**T**HE Plaintiff was assignee of a lease, granted by the Defendant, for the purpose of erecting mills, and other buildings; with covenants for the supply of water from canals and reservoirs, on the Defendant's estates, reserving to the Defendant the right of working and using his then or future collieries, either with regard to the supply of water, or other uses of the collieries, or any locks for the passage of his boats or otherwise: the liberties and privileges granted being, as expressed in the lease, intended to be subordinate to the use and enjoyment of the collieries: the Defendant to have due regard to the mills, &c. and doing as little mischief as the nature of the case would admit.

The Bill prayed, that the Defendant may be decreed so to use and manage the waters of the canals as not to injure the Plaintiff in the occupation of his manufactory; and, in particular, that he may be restrained from using the locks, and thereby drawing off the waters, which would otherwise run to and supply the manufactory; and that he may be decreed to restore the cut for carrying the waste waters from the *Arbury Canal* to *Kenilworth Pool*, and to restore *Kenilworth Stop-gate*, and the banks of the canal to their former height; and also to repair such stop-gates, bridges, canals, and towing-paths, as were made previously to granting the lease; and that he may be decreed to make compensation for the injury sustained by their having been suffered to go out of repair; and that he may be decreed to remove the locks, which have been made since the lease, and to make compensation for the injury sustained by the said locks having been made so near the manufactory; thereby injuring the machinery; and, that he may be decreed to pay the Plaintiff

Order specifically to repair the banks of a canal, and stop-gates, and other works, refused.

But the effect was obtained by an Order, to restrain impeding the Plaintiff from navigating, using, and enjoying, by continuing to keep the canals, banks, or works, out of repair, by diverting the water, or preventing it by the use of locks from remaining in the canals, or by continuing the removal of a stop-gate.

1804.

~  
LANE

v.

NEWDIGATE.

[ \*194 ]

the expence he has been put up to by working the steam engine, to supply the want of water.

\* *The Lord* CHANCELLOR, upon the motion for the Injunction, expressed a difficulty, whether it is according to the practice of the Court to decree or order repairs to be done (96).

Nov. 2d, 13th.

Mr. *Romilly*, in support of the Injunction, said, the repairs to be done in this case are in effect nothing more than was done in *Robinson v. Lord Byron* (97): viz. raising the dam-heads, so that the water shall not escape; as it will otherwise.

*The Lord* CHANCELLOR.


So, as to restoring the Stop-gate, the same difficulty occurs. The question is, whether the Court can specifically order that to be restored. I think I can direct it in terms, that will have that effect. The Injunction, I shall order, will create the necessity of restoring the Stop-gate; and attention will be had to the manner in which he is to use these locks; and he will find it difficult, I apprehend, to avoid completely repairing these works.

Nov. 13th.

The Order pronounced was, that the Defendant, his agents, &c. be restrained until farther Order, from farther impeding, obstructing, or hindering, the Plaintiff from navigating the canal for the necessary purposes of the mill, or from using and enjoying the demised premises, and the mills and buildings erected thereon, or the liberties and privileges, granted by the indenture of lease, &c. contrary to the covenant, by continuing  
to

(96) See the note, ante, (97) 1 *Bro. C. C.* 588.  
Vol. I, 235.

to keep the said canals, or the banks, gates, locks, or works, of the same respectively, out of good repair, \* order or condition; and also from farther troubling, molesting, and preventing, the Plaintiff, contrary to the covenant, in the use and enjoyment of the said mills and buildings, or the liberty, privilege and power, of drawing for the use of the said mill from the canals, &c. a sufficient quantity of water for the use and working of the said mill, by diverting, draining, or drawing off, water; or preventing the same by the use of any lock or locks, erected by the Defendant, from remaining and continuing in the said canals, or by continuing the removal of the Stop-gate, mentioned in the pleadings in the action, brought by the Plaintiff, to have been erected; and by means of which the water could and would have been kept and retained in the said pool for the use of the mill; but nothing in this Order is to extend to diminish, lessen, hinder, or prejudice, the working, using, or enjoying, by the Defendant of his present and future collieries, either with regard to the supply of water for his fire-engine, or other uses of the collieries, or of any locks to be erected for the passage of his boats, or otherwise: the Defendant having due regard to the said mills, and doing as little damage thereto, as the nature of the case will admit.

1804.  
  
 LANE  
 v.  
 NEWDIGATE.  
 [ \*195 ]

1804.

ROLLS.

Nov. 29th,

30th.

Dec. 3d.

## RADCLIFFE v. BUCKLEY.

Under a bequest to children grand-children are

not entitled, [196]

except from necessity; as if the Will would otherwise be inoperative; or, where by other words, as

"Issue," it clearly appears, that the

word "Children" was used, not in the proper, but in a more extensive sense.

The construction not altered upon the inference from the testator's knowledge of the circumstances of the family.

**JAMES BUCKLEY** by his Will, dated the 4th of April, 1799, disposed of the residue of his personal estate in the following manner:


"All the residue and remainder of my personal estate  
 "and effects whatsoever and wheresoever I give and be-  
 "queath unto and amongst all the children lawfully be-  
 "gotten of *William Buckley Henry Buckley John Buck-*  
 "*ley Thomas Buckley* and *Ann* the wife of *Hugh Shaw*  
 "my late brothers and sister deceased to be equally di-  
 "vided amongst them in their respective parents' stead  
 "per *Stirpes* and not per *Capita* share and share alike if  
 "more than one and if but one then I give the same  
 "wholly to that one."

All the brothers and the sister of the testator were dead, when the Will was made; at which time there was issue of *William Buckley* three children living, and several grand-children by four deceased children: the other brothers also left children and grand-children by deceased children. *Ann Shaw* had several children; who were all dead at the time of making the Will; three of them leaving several children.

The bill was filed by the surviving children of *William Buckley*; insisting, that the residue was to be divided among such of the children of the brothers and sister of the testator as were living at the time of making the Will exclusively.

The answers insisted, that the grand-children, and the children of one of the grand-children of *Ann Shaw*, who were living at the death of the testator, and whose  
 parents

parents were respectively dead before the Will was made, were entitled; especially as the testator knew the state of the family, that there had been several children of his sister; and that all of them were dead, before the Will was made; and several of them had left children, living at the date of the Will.

1804.  
  
 RADCLIFFE  
 v.  
 BUCKLEY.

Evidence was produced on both sides, as to the testator's knowledge of the state of the family and his intention.

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Mr. Romilly, Mr. Christian, and Mr. Heald, for the Plaintiffs. Mr. Hall, for Defendants in the same interest.

If this testator meant grand-children by "children" of *Ann Shaw*, he must have had the same meaning as to all: but it is impossible to suppose him, using the word "children" to mean all the children of sons and daughters. The construction, comprehending grand-children under that word, is made only from necessity; where there are no children; and otherwise the legacy must fail: *Reeves v. Brymer* (98): *Crooke v. Brookeing* (99), and in all the cases of this sort there have been some other words; as, in *Royle v. Hamilton* (100), the word "issue." This Will contains nothing, upon which the description "children" can be extended to grand-children. There is a claim on the part of some great grand-children; and the grand-children amount to fifty. Could the testator conceive, that this property could become ultimately vested in one out of such a number, according to the words at the conclusion of the clause? The expression is not simply "children," but with the addition "lawfully begotten" of these persons.  
 That

(98) Ante, Vol. IV, 692.

(99) 2 Vern. 106.

(100) Ante, Vol. IV, 437;

see other references in the notes, IV, 693. III, 200,



1804.  
 ~~~~~  
 RADCLIFFE
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 BUCKLEY.

That expression necessarily confines it. So, the expression, that the children shall stand in the place of the parent, is necessarily exclusive of grand-children; for a grand-father cannot with propriety be called a parent. The introduction of grand-children will be a violation of the words of this Will, and requires the insertion of other words; and the word "children" will have different significations in the same sentence.

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Secondly, evidence as to the state of the family, and the testator's knowledge of it and intention, cannot be admitted: *Maybank v. Brooks* (1); *Edge v. Salisbury*; in which evidence to explain what was meant by "relations," was refused.

Mr. *William Agar*, Mr. *Wingfield*, and Mr. *Wainwright*, for Grand-children and Great Grand-children.

As to the evidence, it may be admitted, not to explain the Will, but as to the state of the family, and his knowledge of it: as in *Goodinge v. Goodinge* (2).

To make this Will consistent, the testator must be taken to have meant legal descendants. If he knew, Mrs. *Shaw* had no children living, meaning children, it was nugatory to insert her name. If her grand-children are entitled, as they are upon *Crooke v. Brookeing*, the grand-children of the deceased brothers must also take. There are cases, where, the testator not meaning to confine the bequest to children, which appeared from the word "issue," grand-children have taken; and it was not considered an objection, that both children and grand-children must take: *Wythe v. Blackman* (3); and upon

(1) 1 *Bro. C. C.* 84.


(2) 1 *Ves.* 231.

(3) 1 *Ves.* 196. *Amb.* 555.

Wythe v. Thurlston, stated

from the Register's Book in
Davenport v. Hanbury, ante,
 Vol. III, 257.

upon the authority of that case *Gale v. Bennett* (4) was decided. According to *Wylde's Case* (5) the description "children" is co-extensive with "issue," to effectuate the intention. The principle, that grand-children and great grand-children may take, where there is no other person answering the description, is established by a case in *Viner* (6); where a grand-son was held entitled under the description of "son." In a case in the Court of Exchequer, cited in *Thomas v. Thomas* (7) it was held, that a great nephew would take by a devise to a nephew.

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 RADCLIFFE
 v.
 BUCKLEY.

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Mr. Romilly, in Reply.

The extended construction is used only in cases of necessity; and there is no instance, that the word "children" has been taken to mean both children and grand-children. *Wythe v. Blackman*, and *Gale v. Bennett*, turned upon the gift over, in case there should be no issue; extending the word "children." If the testator had divided the property in fifths, and given one fifth to the children of each child, I agree, the grand-children of *Ann Shaw* would have been entitled. But there can be no lapse here: the whole residue being given to one, in the event of one only. I admit, the testator knew Mrs. *Shaw* had no children at the date of his Will. There may be some doubt as to receiving the evidence as to that; but unless the contrary is shewn, it is to be presumed, he knew, what nephews and nieces he had. Some words in this Will must have no operation: for instance, "sister:" but it is better to reject that word than to introduce a new rule, attended with the greatest inconvenience. If the grand-children of *Ann Shaw* are entitled, the grand-children of all the brothers

(4) *Amb.* 681.

(5) 6 *Co.* 16.

(6) 8 *Vin.* tit. *Devise*, 310,
pl. 9.

(7) 6 *Term Rep.* 671.

1804.

~
 RADCLIFFE
 v.
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brothers must be entitled: a construction, that cannot be made upon the authorities, or be imputed as the intention, which could not be, that all the descendants should take, and take *per capita*. The construction in *Wylde's Case* was only, that an estate tail was intended. But there is no instance, that under such a *description grand-children have taken as tenants in common with children. Where there are no children the construction is of absolute necessity.

The MASTER of the ROLLS.

Dec. 3d.

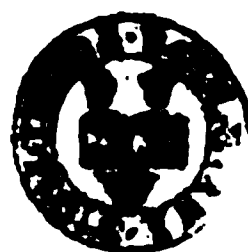
In this case the residue is given to the children of five brothers and a sister of the testator; whom he states to be deceased. The clause, containing the residuary bequest, is not very clearly expressed; and it might be difficult to put a distinct and determinate meaning upon each word. But it seems to me, the residue is so given, that no part would lapse, if any of the children of any of the five were in being at the death of the testator; for it is not divided into fifths, and a distinct fifth given to each family; neither are all the children made tenants in common with each other of the whole residue: but the whole residue is given to all the children, as a general class or body; and then a mode is prescribed, in which the division of that residue afterwards is to be made among them. For that purpose they are to be thrown into families; for that is the reason of their taking in their parents' stead *per stirpes* and not *per capita*; and each set is to have an equal share of the residue. The four brothers having left children, it is contended, that the residue is divisible into four parts. Mrs. *Shaw* has left no children, but has left grand-children and great grand-children; and they contend, that under the circumstances they are entitled to be considered as a fifth set for the purpose of the distribution; insisting,

insisting, that for the purposes of this Will they are to be considered as children. Another claim is made, upon the supposition, that the grand-children and great grand-children of Mrs. *Shaw* succeed, by the grand-children of the brothers; who contend, that they upon the same principle, upon which her grand-children and great grand-children claim, are entitled likewise along with the children of the brothers, so as to increase the number of each set and class.

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~
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BUCKLEY.

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It was not contended, that the description "children," ordinarily and properly speaking, comprehends grand-children. It was decided in the case referred to, *Crooke v. Brookeing*, that if there were children, grand-children could not take with them a legacy, given to children. The decision of the Lords Commissioners in that case was approved by Lord *Northington* in *Hussey v. Dillon* (8); and was not disputed by Lord *Hardwicke* in *Wythe v. Blackman*; and Lord *Alvanley's* declaration (8), that "children" may mean grand-children, where there can be no other construction, but not otherwise, is consistent with, and founded upon, that case. There are two cases, in which that word has received another construction: 1st, the case of necessity; where the Will would remain inoperative, unless the sense is extended: next, where testator has clearly shewn by other words, that he does not use the word "children" in the proper sense, but means it in a more extensive signification. Referable to the first head is *Wylde's* case; where upon a devise to a man and his children it was held, that, if there were no children at the time, the father would take an estate-tail; and "children" would mean issue; for it was evident, something was intended for children: but, none being *in esse*, they could take nothing except through the



(8) *Amb.* 603.

(9) *Ante*, IV, 698, in *Reeves v. Bryner*.

1804.

~
 RADCLIFFE
 v.
 BUCKLEY.

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the father; and he could transmit to them nothing, unless he had an estate of inheritance. It was necessary therefore to construe the word "children" issue, on account of the general, apparent, intention. The other case of exception is, where the testator has indifferently used the words "issue" and "children;" shewing, he * meant to use "children" in the same sense as "issue;" as in *Wythe v. Blackman*, *Gale v. Bennett*, and *Royle v. Hamilton*. It was not in any of those cases determined, that by a mere bequest to "children" the grandchildren are to be let in: but it was clearly shewn, that he meant issue.

In this case it was not contended, that Mrs. *Shaw's* grand-children can claim under the latter class of cases; viz. in consequence of any explanatory words, shewing, he meant "children" in a more extensive sense; for there is not a word explanatory of his meaning; as "issue." No general words of any sort are inserted. Then the claim rests on those cases, which say, that construction may be put upon those words, where it is necessary, and, where the bequest would fail, unless that construction is made. That construction is said to be necessary with reference to Mrs. *Shaw's* grand-children; as she did not leave any children; and it is said, the testator knowing that his intention with regard to her family must wholly fail, unless "children" is construed "grand-children;" so far at least, as respects her family; and I doubted at first, whether it was not possible to construe the word "children" properly in those instances, where there are children, but to mean grandchildren, where there are no children: so as to confine it to the children of the brothers, letting in the grandchildren and the great grand-children of Mrs. *Shaw*. But upon consideration I think it impossible to make that construction. That word is used but once in the Will; and I do not see, how the same word, in the same place,

place, is to have two different meanings, both exclusive and inclusive of grand-children; for, in whatever sense he used it as to one set of children, he meant to use it in the same sense as to all. If he thought the word "children" sufficiently comprehensive to let in all *descendants of Mrs. *Shaw*, he must have thought it comprehensive enough to let in the descendants of all; and it was taken for granted in the three cases I have mentioned, that, if any grand-children were let in, all must be let in. If therefore, in compliance with the supposed intention in favour of Mrs. *Shaw's* grand-children, I put the more extensive construction upon that word, it is necessary, that I should put the same construction upon it in all the other instances. The Court ought to endeavour to impute some meaning to every word, and to give some effect, if possible, to every part of the Will; but with this limitation; provided it can be done consistently with the general intention, and without violating any other provision of the Will. Here, to give some effect to one part, I must in four instances give it an effect, which I am bound to say, it ought not to have, and which I do not clearly see the testator intended in those four instances it should have. In that difficulty therefore the Court ought to abide by the proper construction; and if the proper construction is exclusive of grand-children, upon what authority, for the purpose of answering the supposed intention in one case, am I to disappoint what I am bound by the authorities to say was the intention in four? I cannot therefore give effect to the whole consistently with the limitation I laid down, that every part of the Will, if possible, is to have effect.

It is said, the testator knew, there were no children of Mrs. *Shaw*. That alone is not sufficient to alter the construction the words properly bear. In *Godfrey v. Davis* (10) Lord *Alvanley's* opinion was, that he could not,

(10) Ante, Vol. VI, 43.

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~
RADCLIFFE
v.
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 v.

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not, in order to comply with the intention, to be inferred from the testator's knowledge of the circumstances, alter the proper construction. In that case Lord *Alvanley*, if * he had so done, would not have interfered with any other part of the Will. But here, if I alter the construction out of deference to the supposed intention in favour of the grand-children of Mrs. *Shaw*, I must affect another part, as to which there is no such indication of intention. It is a sufficient ground for adhering to the proper construction of the word, that I do not see a clear intention of departing from it. Where I am to depart from it, I ought to be perfectly sure I am executing the intention: not only as to the family of Mrs. *Shaw*, but as to all the objects of the testator's bounty; and if he uses words, that cannot have effect as to all the objects with any security, it fails through his own fault in not clearly explaining his meaning.

The children of the four brothers therefore are entitled, to the exclusion of all the grand-children of the brothers and the grand-children and great grand-children of Mrs. *Shaw*.

1804.

BLACKBURNE, *Ex parte*.*Dec. 6th.*

Goods sold, to
 be paid for by
 bill at three
 months.

The drawers
 and acceptors

becoming bankrupt, before the bills were due, the vendors, having received dividends under their Commissions, entitled to prove under a Commission against the vendees, who had not indorsed the bills, the deficiency, as a debt: till that shall be ascertained, a claim and dividends reserved for the whole.

GEORGE and *Henry Brown* of *Liverpool*, being indebted to the petitioner to the amount of 3000*l.* for goods sold and delivered, under an agreement for payment by bills at three months after date, gave him a check

check upon their bankers *Caldwell* and Co. of *Liverpool*, who drew upon their correspondents in *London*, *Burton*, *Forbes*, and *Gregory*, a bill for the amount of three months after date, to the Order of the petitioner. The bill was accepted: but before it became due, Commissions of Bankruptcy issued against the acceptors, the drawers, and the *Browns*. The petitioner proved his debt, and received dividends under the Commissions against the acceptors and the drawers. Afterwards he offered to prove a debt of 3000*l.* for goods sold and delivered under the Commission against the *Browns*; exhibiting the bill as a security for that debt; but, the bill not being indorsed by the *Browns*, the Commissioners refused to admit his proof, unless he would account for the dividends, received by him from the estates of the drawers and acceptors, and assign the future dividends, in respect of the bill. The petition therefore was presented; praying, that the petitioner may be at liberty to prove his said debt of 3000*l.* against the estate of the *Browns*, without delivering up the bill, or making over the dividends; and that he may receive a dividend upon such sum as shall not be satisfied out of the estates of the acceptors and drawers.

1804.
BLACKBURN, *Ex parte.*

[*205]

Mr. *Romilly*, in support of the Petition, cited *Ex parte Dixon*, before Lord *Thurlow*; *Ex parte Thomas*, and *Ex parte Myers*, before Lord *Rosslyn*, in these bankruptcies.

Mr. *Richards* and Mr. *Cooke*, for the Assignees.

The last decision upon this point, *Ex parte Rathbone*, before Lord *Rosslyn*, in these bankruptcies, is in favour of the assignees. First, the petitioner is bound to have this bill considered as payment; and cannot consider it as a security: *Clark v. Mundal* (11). *The Bank of Eng-*
land

(11) 1 *Salk.* 124.

1804.
 ~~~~~  
 BLACKBURNE,  
*Ex parte.*  
 [ \* 206 ]

*land v. Newman* (12). *Ex parte Taylor*, Aug. 7, 1795; in which it was held, that, if a bill is taken for goods, \* and is not indorsed, it is payment. That decision certainly was doubted by your Lordship and the *Solicitor General*. But the principle is, that he takes the bill, meaning to abide by it; and cannot resort back to the other remedy. This is the precise case put by Lord *Holt* in *Clark v. Mundal*. There was no contract for security.

But, 2dly, if the petitioner is not bound to take the bill as payment, he must rescind the transaction altogether; and deliver up the bill; according to the opinion of Lord *Kenyon* in *Puckford v. Maxwell* (13), that, if a bill turns out bad, the holder may, if he thinks fit, consider it as a nullity. But he cannot, as attempted here, consider it as a security. . Not taking it as payment, he is bound to return it.

Mr. *Romilly*, in Reply.

Lord *Kenyon* means a bill certain; not, in the abstract. This agreement is for payment by bills at three months; which must be understood good bills.

*The Lord CHANCELLOR.*

Bill taken for an antecedent debt without indorsement, proving bad, the antecedent debt may be resorted to: but, if the bill is discounted without indorsement, and no antecedent debt, it is evidence

I take it to be now clearly settled, that, if there is an antecedent debt, and a bill is taken, without taking an indorsement, which bill turns out to be bad, the demand for the antecedent debt may be resorted to (14).

It

(12) 1 <i>Lord Raym.</i> 442.	by Mr. <i>Roots</i> , 147.	<i>Ex</i>
12 <i>Mod.</i> 241. <i>Comyn's Rep.</i>	<i>parte Rathbone</i> , <i>Buck</i> , 215.	
57.	3 <i>Madd.</i> 134.	<i>Ex parte</i>
(13) 6 <i>Term Rep.</i> 52.	<i>Hodgkinson</i> , post, Vol. XIX	
(14) 1 <i>Cooke's Bank. Law</i> ,	291.	
124, 174, 5th edit.; 8th edit.		

of a purchase; and there is no demand.

It has been held, that if there is no antecedent, and *A.* carries a bill to *B.* to be discounted, and *B.* does not take *A.*'s name upon the bill, if it is dishonoured, there is no demand; for there was no relation between the parties, except that transaction; and the circumstance of not taking the name upon the bill is evidence • of a purchase of the bill. In a sale of goods the Law implies a contract, that those goods shall be paid for. It is competent to the party to agree, that the payment shall be by a particular bill. In this instance it would be extremely difficult to persuade a Jury, under the direction of a Judge, to say, an agreement to pay by bills was satisfied by giving bills, whether good, or bad. The bills were only a mode of paying the debt of 3000*l.* If they are not paid, the original debt, arising out of the contract for goods sold and delivered, remains. It is clear, the creditor, still holding the bills, cannot resort to that original contract. In general cases, where the bill is not paid, if there is no bankruptcy, the creditor must come immediately upon the bill dishonoured; saying, he cannot procure payment; and desiring to have payment; and then he might maintain an action for goods sold and delivered. There may be cases, in which he may have received part of the money, without involving the difficulty from giving time as to the rest of it; as, if part was paid before it was due; in that case, if no time was given for payment of the residue, an action for goods sold and delivered would lie for the residue.

As to the cases in bankruptcy, there are considerable difficulties attending all the transactions in such a case as this. There must be some mistake in Lord *Rosslyn's* order, *Ex parte Myers*; for to the extent, in which his debt was paid, he could not possibly prove; but only for the remainder. On the other hand, if you are to go under the Commission against the man, who bought the goods,

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goods, and draw out 20s. in the pound, and if by so doing you bring the others upon the bankrupt, it is hard : but, though hard, it may not be unjust. Lord *Thurlow* thought it also unjust. The order in *Ex parte Dixon* was upon this principle ; that, if the holder made as much of the bill, as he could, it was not competent to the vendee to say, there should not be proof under his bankruptcy for the residue of the money. His Lordship allowed a claim upon the whole, not for the purpose of receiving a dividend upon the whole, but to receive such sum as should be unpaid under the other Commission ; allowing it to be considered as a nullity, so far as it was a nullity, and proof for the residue. The ground, upon which the petition in *Ex parte Rathbone* was dismissed, must have been, that the bill was received in discharge and satisfaction of the price, in this sense, that it was to be the payment, and the only mode of payment.

My opinion is, that in this transaction it was not an essential part of the contract, that he, who received the bills, should never have a demand for goods sold and delivered, if the bills were not paid. If this case does not fall within *Ex parte Rathbone*, I understand Lord *Thurlow's* Order to be one, that ultimately did not permit proof beyond what remained unpaid ; though in the form the claim was for the whole. Lord *Thurlow's* Order, so understood, appears to me the best.

Therefore let a claim be made, and the dividends reserved, for the whole : not to be paid, until it is seen, what shall be paid under the other Commissions : then let the proof be for the difference between what is so paid and 20s. in the pound ; the dividends to be paid upon that residue.

## MICHAELMAS TERM,

45 GEO. III. 1804.

## UNDERHILL v. HORWOOD.

1804.

Nov. 16th,

19th, 20th.

**I**N 1796 *Cleophas Comber* and *Daniel Smith*, partners in trade, for the purpose of raising the sum of 1400*l.* agreed, in consideration of that sum, to grant an annuity to *William Coare* of 155*l.* 11*s.* 1*d.* being nine years purchase, for the lives of the grantors, and four other persons, and the survivors and survivor; and accordingly a bond was prepared, dated the 24th of *December*, 1796; purporting that *William Smith*, *George Smith*, *Richard Underhill*, *Charles Comber*, *Cleophas Comber*, and *Daniel Smith*, were jointly and severally bound to *William Coare* in the sum of 2800*l.*; with condition, reciting the agreement to grant the annuity for the price of 1400*l.*; which sum *Coare* had that day paid to the said grantors, (repeating all their names); the receipt whereof they did thereby respectively acknowledge: to be void, if they or any of them, their, or any of their heirs, executors, &c. should pay the said annuity during the natural life of the survivor of them, the said *William Smith*, &c. A memorandum was indorsed upon the bond for redemption.

Relief in equity upon inadequacy of consideration, so extreme as to satisfy the Court, that there must have been imposition or oppression.

Jurisdiction in equity to order instruments, void under the Annuity Act, to be delivered up.

Several objections put in a course of trial at law.

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The bond and warrant of attorney were executed, and the receipt signed, in *London*, by *Underhill*, *Cleophas Comber*, and *Daniel Smith*, on the 24th of *December*, 1796. Immediately afterwards, upon that day, they went with *Coare* to his banker; where he received Bank-notes for 1400*l.*; and gave them to *Daniel Smith*; who immediately paid them into the Bank, in the joint names of himself, and *Lowe*, *Coare's* Solicitor; taking an accountable receipt; under an agreement or understanding for that purpose, in consequence of *William* and *George Smith* not having then executed, and of some accident, which prevented *Charles Comber's* attending to execute; on which account *Paul Giblett* was substituted as a surety in his place; who executed a separate bond on the 25th of *December*; taking a bond of indemnity from *Underhill*, and others of the obligors. On the same day the bond and warrant of attorney were executed by *William* and *George Smith* at *Leicester*: *Daniel Smith* having after the transaction at the Bank gone to *Leicester* for that purpose. He returned on the 26th; and delivered them to *Lowe*; and received the money at the Bank.

The Bill was filed by *Underhill*; praying, that the securities for granting the annuity may be declared void under Act of Parliament (15); an account of the principal and interest, and of the payments under the annuity; and that the balance may be paid out of the personal estate of *Cleophas Comber*, and by the Defendant *Daniel Smith*; and in case the Court shall be of opinion, that the securities ought not to be declared void, then for a redemption, and that the Plaintiff may be indemnified, and the other sureties contribute, &c. and for an injunction.

The

(15) Stat. 17 Geo. III, c. 26. Repealed by Stat. 53 Geo. III, c. 141. See the note, ante, Vol. II, 36.


The memorial stated, that the bond was not yet executed by *Charles Comber*; that the consideration was the sum of 1400*l.*, that day paid to *William Smith, George Smith, Richard Underhill, Charles Comber, Cleophas Comber, and Daniel Smith*; that that sum was paid to *Daniel Smith* for the use of himself, *William Smith, George Smith, Richard Underhill, Charles Comber, and Cleophas Comber*, by *Coare*. The memorial also stated merely, that these six persons became bound; not, that they were jointly and severally bound, except that it is so recited in stating *Giblett's* bond; and did not notice, that the heirs were bound: but the condition was for payment by the obligor, his heirs, executors, &c. Upon these points some additional objections, besides those which were before the Court of *King's Bench* (16), were brought forward. *Lowe* by his depositions stated, that he asked, whether all were principals; and *Daniel Smith* answered, all were principals to *Coare*.

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Mr. *Romilly*, Mr. *Hollist*, and Mr. *Hart*, for the Plaintiff: Mr. *Piggott* and Mr. *Martin*, for other Sureties, Defendants.

First, this annuity has been granted under such circumstances of gross imposition, and advantage taken of distress, that the securities ought not to stand. In support of that proposition certainly there is nothing but inadequacy of value: but that, where it exists in a very great degree, will do; though there is certainly no rule more definite than that adopted by Lord *Thurlow* in *Heathcote v. Paignon* (17); an inadequacy, sufficient to excite an exclamation. There is no instance of a grant of an annuity for the lives of six persons. It would be equally good, if for the lives of all the members of both

(16) See *Coare v. Giblett*, 3 *East*, 461. 4 *East*, 85. (17) 2 *Bro. C. C.* 167.

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both Houses of the Legislature, and other larger descriptions of persons; upon which the argument turned in *Thellusson v. Woodford* (18). This annuity, for six lives, at nine years purchase, would surely fall within Lord *Thurlow's* rule. The evidence is incredible: one witness making the difference between the grant of an annuity for a life of thirty, and one for that life, with the addition of the five other lives in this case, only one year and seven months: another witness not carrying it quite so far; making the difference about two years.

The question of jurisdiction has been so much discussed lately (19), and your Lordship delivered your opinion upon it so fully, that it is unnecessary to enter into that point. The Bill brings forward three objections, that were not taken at Law: 1st, that two only of these persons were principals, and the rest sureties: 2dly, that the bond was considered joint and several, though executed by five only of the obligors: 3dly, that it is not stated in the memorial, that the heirs are bound, though they are really bound. The bond not having been executed by all these persons, *Charles Comber*, by accident, as it seems, never having executed, it never was a joint bond. The six not having executed, it is not the joint bond of the five, or any of them; the instrument purporting, that they bound themselves jointly with the sixth. The memorial states the bond merely as a joint bond; not taking any notice, that it was the separate bond of each; which omission forms one objection; which was disposed of by the Court of *King's Bench*; holding that objection not to be fatal. In *Wiley v. Cawthorne* (20) a memorial, stating, that the ob-


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(18) Ante, Vol. IV, 227.
 Post, XI, 112.

(19) Ante, *Bromley v. Holland*, Vol. VII, 3.

(20) 1 *East*, 398.

ligors were severally bound, was held bad; the bond being joint and several. It states, that they bound themselves; but not, that they bound their heirs, executors, and administrators. The effect is very different. To bind the heir, it must be shewn, that the heir is named, though it is otherwise as to executors: *Barber v. Fox* (21). That circumstance therefore is essential and necessary to be stated; and the omission of it is therefore fatal. All the Courts are of opinion, that it is necessary to state, by whom and to whom the consideration was paid. The memorial states, that it was paid to *Daniel Smith* for the use of himself and the five other persons. That is not correct. It was for the use of himself and *Cleophas Comber* only, who were the principals; the others being only sureties; and *Charles Comber* being previously put entirely out of the transaction. The answer to that objection is, that the grantee and his solicitor understood it was paid to the use of all. But it was impossible to doubt, that *Giblett* was a surety. He was to be indemnified. That transaction made it clear, that *Charles Comber* was intended to be a surety only. In the case of *The Duke of Queensberry v. Mackreth*, still depending before the House of Lords, upon one point the Judges have delivered their opinion; that the memorial is bad; stating the consideration to have been paid to *Martindale* and *Mackreth*; the latter being merely a surety: so that in truth the payment was to the former only.

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Another objection is to the bond, as stating, that the consideration was paid upon the 24th of *December*, the day of the date of the bond. As to that the answer is, that the money parted from the grantee, and was put out of his power, upon that day. But the question is, whether it was received by the other. The argument would

(21) 2 *Sand.* 136.

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would be as good, if the money was locked up in a banker's for years. If the money is paid by an agent, the memorial must so state it: *Dalmer v. Barnard* (22), *Glass v. Mount* (23). The act in terms mentions nothing upon that; but the third Section requires, that it should be mentioned, by whom, and upon whose behalf, the consideration was paid. In *Poole v. Cabanes* (24) the grant was held bad: the particulars of the draft not being stated. The construction of the act has been to require all these circumstances to be set forth, that the Court may have an opportunity of seeing the whole transaction. The transaction at the banker's was a payment in form merely: the Bank Notes being put into the hands of *Daniel Smith*; and under a previous agreement, that the money should not be parted with, until all should have executed, immediately paid by him into the Bank upon an accountable receipt, to pay upon demand of *Smith*, and *Lowe*, the solicitor. By the effect of that transaction *Lowe* was more than a mere agent: he and *Smith* being constituted joint trustees, to return the money to the grantee, if the security should not be executed to his satisfaction; and, if it should be executed, to let the grantors receive it. *Lowe's* name therefore ought to be stated. The payment was in effect to *Coare* himself, *Lowe* being the same as *Coare*, and to one of the parties, entitled, upon their own statement, to a sixth only. In fact, it was no payment; for there cannot be a payment in law, so as to charge the party with interest, until he has the actual use of the money. Upon such a payment a case of usury could not be sustained. Consider the effect with reference to the Plaintiff, a surety. There was no undertaking by him to alter the contract; which must therefore stand upon the legal

(22) 7 Term Rep. 248.

(24) 8 Term Rep. 328.

(23) 7 Term Rep. 390.

legal instrument. His contract upon the bond is joint and several: instead of that, the grantee chooses to make it several only. It is not therefore the precise and specific contract the Plaintiff entered into. How can the truth of the transaction, and the nature of the obligation, be collected from this memorial? The change of circumstance was not mentioned to the *Smiths* at *Leicester*, when they executed upon the 25th of *December*.

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Mr. *Alexander* and Mr. *Bell*, for the Defendant,  
*Coare*.

This transaction cannot bear the representation of gross inadequacy and oppression, alluded to by Lord *Thurlow*: a criterion, that affords no certain rule.


Upon the other questions, there is no reason for taking the jurisdiction from a Court of Law. The Plaintiff has no account against the Defendant. The only ground of jurisdiction therefore is, to set aside the instruments; lest a bad use should be made of them. An action is brought; and *Underhill* has pleaded. As to the objections upon the Statute, there is nothing positively enacted as to the circumstances of payment. It stands only upon construction, that the time forms a material part of the consideration. Nothing more can be necessary than to state the fact, as represented at the time; and it is in evidence, that *Lowe* asked, whether they were all to be principals; and the answer was, that they were. *The Duke of Queensberry v. Mackreth* is not yet decided. Upon the objection, that the payment was upon the 26th of *December*, not the 24th, as stated, the Court of King's Bench held, that if not paid upon the 24th, that was an immaterial issue. But the payment was on the 24th, within the spirit of the act; though *Daniel Smith* agreed not to dispose of the money, until  
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the security could be completed, which was done two days afterwards. The rule adopted by Lord *Ellenborough* is, that, if a particular circumstance is positively required by the Act of Parliament, the Court cannot dispense with it; but if it depends upon construction only, in this way, the Court may judge of the materiality; and, whether the transaction is fair or colourable. The variation in this instance is not material; and the money must be taken to have been, not only paid, but received. It clearly was paid. It was out of the power of *Coare*; and it never returned to him. Upon that ground no case of usury could be set up. As to the omission of the word "heirs," it is almost universally understood, that a bond by its nature binds the heirs; though certainly that is not the law. But the question is not upon the strict law; but, whether the memorial gives sufficient information; the object of the Legislature being to make the transaction public. But the memorial states the condition to be for payment by the obligor, his heirs, executors, or administrators. It is not necessary to state every circumstance. The objection for not mentioning the personal engagement of the grantor to pay the expences, has been held not fatal: *Mouys v. Leake* (25),

Upon the objection, that this is not the joint obligation of these persons, though it is so stated, that is not material; for there is no doubt, at law it is the several obligation of each. What relief there may be in equity is a different question. If they bind themselves in one instrument severally, the effect is the same as if they entered into several obligations. The action, brought against this Plaintiff, is a several action. The fact is sufficiently stated, if it appears by way of recital; and

and it is in that way stated to be joint and several; and upon that ground it was held sufficient in the Court of King's Bench.

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Mr. *Richards*, for the Defendant *Giblett*, insisted, that, if the annuity was good, he was entitled to proceed upon his indemnity; having already been compelled to pay money under threats of entering up judgment: if the annuity was bad, all the securities must be set aside; and the Plaintiff could not prevail against *Coare*; leaving *Giblett* open to him,

Mr. *Romilly*, in Reply.

As to the payment, is not the annuity perfectly different from the description: if it was to commence, perhaps, a month before payment of the consideration? If it was put out of the control of *Coare*, it was for his benefit. Though he does not make interest of it, he has the advantage of improving his security by it. Suppose, at the end of two days *Giblett* had not thought proper to execute a bond; or either of the *Smiths* at *Leicester* had refused upon the 25th to execute: could not *Coare* have recovered the money in an action for money had and received? The statement of the condition of the bond is no answer to the objection upon the omission of the heirs; for one man may be bound, that another person shall do an act: or a man may bind his personal representatives, that his real representative shall pay. It is immaterial to consider, how *Mouys v. Leake* is to be reconciled with other cases: the question here being, whether it is necessary to state the true effect of the instrument. This case shews the danger of holding, that the recitals in a deed are to be taken as allegations of the fact. The necessary consequence of the decision at Law is, that this is a several bond; and that forms another

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another objection; for if the recital is a sufficient allegation of the fact, they must take care, that it is a true recital.

The Lord CHANCELLOR.

This bill is filed upon various grounds; to which it is necessary to advert, with a view to sustain the jurisdiction of this Court; first, supposing the instruments invalid: if not, that the contract is in its nature so unconscionable, that, admitting the legal validity of the instruments, this Court ought to interpose upon grounds of conscience to have them delivered up: finally, that, if they are not to be delivered up, there ought to be a redemption by force of the contract. As to the jurisdiction upon the validity of the instruments from defects in the memorial, it would be improper to say more, than that it has been repeatedly settled, that this Court will upon such objections order them to be delivered up. The Courts of Law in their zeal to destroy annuity transactions for some time mis-read the Act of Parliament; and supposed, they had that power. Lord Chief Justice *Eyre* first corrected that: but it has been since settled, that, the instruments being by the Act declared void to all intents and purposes, there is inherent in this Court that jurisdiction to order them to be delivered up; and if that doctrine could be maintained in any case, in such a case as this the Court would struggle to maintain it; for this species of instrument in Equity creates, not only relations, but duties, between the obligee and the obligors, and between the obligors, as among each other; upon which several actions may be brought, and suits for contribution both in Law and Equity. If there is a jurisdiction, that one obligor may have the instruments delivered up, in such a case, so pregnant with the seeds of suits, I should be inclined to hold the jurisdiction;

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* There is no doubt therefore of the jurisdiction to direct these

these instruments to be delivered up, if the objections can be maintained.

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As to the unconscionable nature of this bargain, I hardly know how to express it; but must express it in terms, that have been used by the Court before; that, if the terms are so extremely inadequate as to satisfy the conscience of the Court by the amount of the inadequacy, that there must have been imposition, or that species of pressure upon distress, which in the view of this Court amounts to oppression, this Court would order the instruments to be delivered up (26), though Courts of Law might hold that judgment not within the sphere of their powers. I never have been more astonished than in the course of this evidence; attempting to prove, that there is so little difference between an annuity for one life of the age of 30, and five such other lives as are the *Cestuis que vie* in this transaction. We all know, that, when in the case upon Mr. *Thellusson's* Will (27) it was objected, that accumulation for nine lives was an evil, not to be tolerated by Courts of justice, for that was the proposition, upon which the House of Lords have not yet come to a decision (28), the argument occurred to no one, that an accumulation for six lives, though it is less striking, would have been so little more mischievous than for one life; the legality of which no one could doubt. I cannot come to the conclusion, whether the inadequacy is so gross, until I understand from some evidence, what is the real value; for, though the witnesses state their opinion, that an annuity for six lives is worth little more than an annuity for one life, they have assigned no reason, upon which the Court can judicially

(26) Ante, Vol. VI, 273.
See *Mortlock v. Buller*, post, 292, and the note, Vol. VIII, 137.

(27) Ante, *Thellusson v. Woodford*, Vol. IV, 227.

(28) The Decree has been since affirmed. Post, Vol. XI, 112.

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cially act, for that opinion. If it rests upon that therefore, there must be some species of inquiry. In *Heathcote v. Paignon* the inquiry was as to the market-price (29). I doubt, whether that is so good an inquiry, as what is the value. The market-price may be under the value; and the object is to enable the Court to determine upon the inadequacy of value.

That inquiry I should not wish to direct, if this can be determined upon any other point; as, 1st, whether the securities are good at Law; which ought to be first decided. A second ground is furnished by a variety of objections to the memorial. It is put thus by the Defendant: 1st, that there is not ground enough to induce the Court to say, the questions stated ought to be discussed even at Law: 2dly, that it is perfectly clear, they are of such a nature, that this Court ought not in the first instance to dispose of them; but ought to send them, as legal questions to Law. In the last case, determined by me (30), I ordered the deeds to be delivered up; being of opinion, that upon objections to the legal effect of the instruments I ought to decide the question, but expressly declaring the reason, that I thought it within the jurisdiction of a Court of Equity to decide the point of Law; though a Court of Equity ought to be very cautious not to exercise that jurisdiction, if the point is reasonably doubtful. If that was proper in that instance, it is more peculiarly proper, where the objections seem at least founded upon assertions in Law, which directly contradict the judgments of the Courts of Law. One ground, upon which the bill may clearly be sustained, is, that adverting to the infinite variety of suits, that may take place, I can arrange that suit in a Court

(29) See ante, Vol. VI, 274.
VIII, 137.

(30) See *Bromley v. Holland*, ante, Vol. VII, 3, and the references.

Court of Law, so that they should have an opportunity of bringing before that Court all the objections, that can be made; that the decision may bind all the obligors and obligees; and in order to determine upon the validity of the instruments, in which all their demands must be founded.

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The first objection is, that it is stated in the memorial, that the money was paid to *Daniel Smith* for the use of six persons; and it is contended, that it was not so paid in fact; but was paid to him for the use of himself and *Cleophas Comber*; and that the other four, of whom only three executed, were mere sureties. It might be paid as between the obligee and the obligors to the use of all; though as among the obligors themselves it might be for the use of two only. That is a question of fact; whether it was received by *Smith* for the use of all six, or of himself and *Cleophas Comber* only. The form of the issues admitted of the decision of that question, and the finding of the Jury is in strictness a decision upon all the propositions contained in them. But, upon looking at the Report, the question really agitated was, whether it was a payment by *Coare* to the use of the six, or a payment by the hands of *Smith* and *Lowe* to the use of the six; and there was ground enough for contending, that it was in the latter way; as it would be if it was a payment upon the 26th, not upon the 24th; and Lord *Ellenborough* says, the form of the plea did not bring that question before them; being of opinion, that facts might have been brought by plea upon the record, that would have called for the judgment of the Court upon those facts; and the question then is, whether these parties, considering, that there is an infant, have not a right to bring those facts, that will put upon the record a plea worthy the attention of the Court.


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Another objection is, that the time of payment is not accurately set forth in the memorial. If it is true, that the time of payment will not form a material issue, it follows, that the objection, founded upon the time of payment, cannot furnish a ground for setting aside this bond. But then is it material to be set forth in the memorial? I feel insuperable difficulty in supposing that; and I ought not to go the length of giving the parties the countenance of saying, they shall be at liberty to take the opinion of a Court of Law upon it. The first section of the Act does not require the consideration to be set forth in any other terms than "the consideration or considerations." In the third clause, coming to speak of the deed, it states circumstances as to the consideration, as requisite for the deed, of which no notice is required in the memorial by the former section; and the time is not mentioned in either clause. The first section requiring nothing but the consideration to be set forth, without any circumstances, and the third section requiring only, by whom and upon whose behalf it was paid, two circumstances, by no means so material for the world to know as many others, I should have said, upon the two clauses, taken together, the Legislature did not mean, that any circumstances should be set forth, except such as were expressed as to the deed in the latter clause. But it is clear, that has not been the course of decision; which has gone the length, that all the *res gestæ* are to be set forth: the effect of the instrument, whether joint or several; for whose use; and a great variety of circumstances, which the Act has not required to be disclosed; unless they are circumstances, without the disclosure of which the memorial does not manifest, what was the consideration; and then it is said, it comprises, by whom, upon whose behalf, in what manner, whether by principal or agent, and all the circumstances, going to the *res gestæ*, that have been required in the several

several cases; and it has been held, that those circumstances, expressly required to be stated, shall be stated, whether material for the information of the public, or not. In this case the Court of Law has gone on to say, and must, consistently with former decisions, that those circumstances, which are material, shall be set forth, if substantially, though not expressly, required by the Act.

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Then, is the time of the payment to the grantor a material circumstance, and material with reference to the consideration? And I agree, the time of payment is of itself a circumstance extremely material to the value of the consideration. It is of no consequence, that in this instance the difference was but two days; for the question is, not upon the particular circumstances of any case, but, whether in general the time is essential in ascertaining the value of the consideration, and the decision upon the small interval of time in this instance must regulate the decision, if an interval of twelve months had elapsed. It was not the object of the Act to distinguish, whether it proceeded from the default of the grantor or the grantee, that the money was not received till after the time; that in the former case the difference is not essential; but it is in the latter. That is a distinction, for which there is no ground in the Act. It is objected in this case, not only, that the delay proceeded from the default of the grantor, but also that the grantee had no benefit. That is not correct. By the agreement, regulating the dealing with the money upon the three days, the 24th, 25th, and 26th (supposing, there is ground to infer a payment in fact upon the last of those days) the benefit to the grantee is, that dealing with that money in that manner, he gets his annuity by it. It had the effect of securing to him the annuity; for the money was detained for the very purpose of pressing *Daniel Smith* to procure the execution of the deeds by
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the other parties. I will put two or three cases. The only annuity *Coare* was bound to accept was one granted by five, perhaps by six, and *Giblett*, upon the recital, that the bond was not executed by *Charles Comber*. Suppose, one or two of them had died: must *Coare* have gone on? He was entitled to say, his annuity was to be secured by these six grantors; and he might in the case I have put have refused to take it. Then, whose money was that at the banker's in the name of *Daniel Smith* and *Lowe*? In this Court, there is no doubt that money must have been returned to *Coare*: also it might have been recovered in an action for money had and received; for the real agreement, even supposing the payment to have been on the 24th, is, that the money should be paid to *Smith*; but he should not keep it; and it should be paid into a bank in the names of himself and another; and he would become a trustee for the person entitled to the money; having regard to the fact, whether the security was perfected to his satisfaction, or not. Therefore in this sense a benefit resulted to the grantee, that secured to him the annuity, or a return of his money.

Another circumstance, with reference to the consideration, is, whether, if circumstances are to be set forth, the Legislature did not mean, that the time should be set forth, though it was by default of the grantor that he did not receive the money; if that had its effect in a transaction, that has the quality of an agreement, in which the grantee took a part, that the grantor should not receive the money until a particular period. Otherwise how is the Court to know, what the consideration was? The delay might have brought the day of payment of the consideration down to the first payment of the annuity, or farther. If the cases are to stand, which require substantial circumstances to be set forth, not required by the Act, with all respect to the judgment already

already given, I am not satisfied, that the time of payment of the money does not furnish a material objection to the annuity; and I wish that point to be reconsidered.

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The next objection is, that there is no memorial, that this is a joint and several bond. Upon that it is said, that the original transaction, as intended, was, that six persons should become jointly and severally bound; that the instrument prepared was joint and several; that an accident was supposed to have happened to one of them; and he could not attend to execute; and it was then proposed, that *Giblett* should execute, not that, but another, bond; and should receive an indemnity; and the course of the transaction was, not that a new bond should be prepared, substituting *Giblett*; but that the original bond should be executed by the five, *Charles Smith* not executing; and that *Giblett* should execute another bond; obliging himself, that the other six shall pay; and that a bond of indemnity should be given to him, not by the six, nor the five, who execute, but by three of those five. First, is that bond both joint and several? Without saying, what the law is upon that, it is not the joint bond of the five. It is said, it is the several bond of the five; and then, if the party can maintain his action upon it, this Court ought not to interpose. My inclination upon that is, that it is the several bond of the five; but I state that with this observation; that it is not an opinion formed upon the research into the authorities, that may be due to it. I had a notion, which, I think, was not correct, that, where a man executes a bond, meaning, that it should be the joint bond of himself and another; and not his several

Where a man
 executes a
 bond, meaning
 it to be the
 joint bond of

himself and another, who does not execute, it is the several bond of the former: but he may have it delivered up, as contrary to the intention.

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several bond; it would not be his several bond. But the cases go farther. In such a case, however, unless there is something special, the man, who had become so severally bound, has a right to have that bond delivered up (31); for his intention was, not to become a mere several obligee; but to be a joint and several obligee; and the rights are different both in law and equity; for if he is only a several obligee, he has no remedies over against any one: but, if he is a joint and several obligee, or only a joint obligee, there is right of contribution against the other sureties in equity, from the earliest times, and of exoneration from the principal. At Law the contract is perfectly different. The objection of the obligee, that a Court of Equity should not interfere, must depend upon very special circumstances. There might be such a case; if for a great length of time acts had been done, amounting to a waiver of the objection.

It is not necessary in this stage to decide upon that part of the case; nor to consider it farther, than to shew, that it is material as to the defect or sufficiency of the memorial. That proceeds upon this; that, either the memorial does not assert any thing sufficiently as to the nature of the security; or it asserts what is false. It is said, if the nature of the security appears upon any recital in the memorandum, from that recital there is as express information as to the nature of the security, as if that part of the memorandum, which sets forth the security, had itself contained the terms; and though this bond is not stated as joint and several, yet in stating *Giblett's* bond it is recited as being joint and several. One point is, whether the doctrine applies to a recital in an instrument, that is not the instrument of the party, whose instrument is recited. Another material circumstance is the ground for what is stated in the Report of this

(31) Post, 227, and the note, 228.


this case in the Court of King's Bench, that the recital is not true. It is not; unless that bond, intended to be the bond of the six, is the bond of the six, or is the joint bond of the five; for, if not, the recital, that it is the joint and several bond of the five, containing the circumstance, that it was not executed by *Charles Smith*, that is not true; unless it can be made out to be the joint bond of the five.

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Another objection is, that the heirs are not mentioned; as bound. If the real meaning of the Act is, not, that you shall set forth in the memorial and deed every thing the Act requires, but the *res gestæ* in this sense, that every thing material shall be set forth, it cannot be denied, that the statement, that the security affects the real property of the grantor, is material. Many of the decisions under this Act go greatly beyond what the Legislature meant to require: but there is so much of decision upon it, that it must be considered as having that authority. It is said, there is enough in the memorial to shew the heirs were bound: the condition expressing, if the heirs, executors, &c. pay. My present opinion is, that, if a man in express terms binds himself, his executors and administrators, there is no way of contending, that, because the condition, which is to avoid the obligation, imposed by that bond upon the personal representative, is a condition that may be performed by the heir, therefore the heirs are bound. I know, both in causes, and in bankruptcy, where there is a joint bond, the Court has sometimes inferred from the nature of the condition and the transaction, that it was made joint by mistake; and would rectify that; decreeing in a cause, that a new bond shall be executed, joint and several; and, as this Court would so decree in a cause, ordering in bankruptcy, that proof shall be made ac-

Mistake by making a bond joint only, instead of joint and several, rectified in Equity and Bankruptcy.

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cordingly (32). But that turns upon this; that the instrument, though joint only, was intended to be both joint and several; and therefore the Court will make it what it was intended actually to be. But I never understood, that, though upon the ground of mistake this Court would reform the instrument, therefore it would hold, that the instrument has a different effect from that, which belongs to it at law. If the Court of Law should think it material, that the heirs should be set forth, the extent of that is for their consideration; for in fact there is scarcely an instance of an annuity without a covenant binding the heirs; and I am not aware, that it was ever supposed necessary to set forth the purport and effect of all those covenants.

This, I believe, exhausts the whole of the objections, that were taken. Another objection occurred to me. There is considerable difficulty to construe this with reference to the first clause, where the deed is executed by different parties, upon different days (33). The first clause directs, that a memorial shall be enrolled within twenty days of the execution; and shall contain the day the deed bears date. The question therefore is, in Law, what is the meaning of the words, "the day of the date?" The day of the date of a deed is, I apprehend, the day of the execution. It may be otherwise, where the expression is "the day the deed bears date." But, whether the Legislature meant in this clause the day of execution, may require some argument. If the day the deed bears date means expressly the day put upon the parchment, that certainly may be a day, on which no one party executes: it may be a day, on which some execute, and some

(32) Ante, *Thomas v. Frazer*, Vol. III, 399, and the note, 402.

(33) *Philipps v. Crawford*, ante, Vol. IX, 214. Post, XIII, 475.

some do not; and then the question is, from what time are the twenty days to be accounted. Suppose, the bonds in this case were executed on the 1st and 2d of *January*; and the bond was the several bond of each; and no relief was to be had in equity: then a memorial, enrolled upon the 22d of *January*, would be a good memorial as to the man, who executed upon the 2d; and bad, as to him, who executed upon the 1st. There would be great singularity in the law, if those words, “the day of the execution” and “the day the deed bears date” have not the same meaning. I am not aware, that this has been noticed in any case.

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Upon the result of the whole, the first question for this Court to decide is, whether this bond is a legal instrument? This Court may decide that question without sending it to law. But I am far from thinking, if these objections were all originally made, it would have been proper to decide upon them in the first instance; and it is still less proper, some of them having received decisions at law, denying their validity. The best course will be, that some of the actions, that are brought, should be tried; giving liberty to any of the parties to introduce objections to the memorial by way of plea; and all parties to be at liberty to attend the hearing of the cause. If so, there will be no room to raise the questions as to *Giblett*; whether he is bound at any rate; and, if he is, whether this Court will interfere to prevent his making use of his bond of indemnity. Neither of those questions will arise, if any of the objections to the memorial are good. If therefore in any of the actions, that are brought, these objections can be introduced upon the record, they shall go to trial; and all parties shall be at liberty to attend the trial (34).

(34) Affirmed on rehearing *Ware v. Horwood*, post, Vol. XIV, 28.

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Portion given over as to the greater part upon marriage without consent of executors.

A conditional consent, upon the offer of a settlement, retracted on a subsequent refusal to settle, and the marriage taking place afterwards: no relief against the forfeiture.

ELIZABETH DUTENS by her Will gave and bequeathed the sum of 12,000*l.* to trustees, in trust, to apply out of the interest unto her grand-daughter *Elizabeth Callander* the sum of 250*l.* a-year for her maintenance and education, until she should attain the age of twenty-one years; and the residue of the dividends, &c. to accumulate for her benefit; and when she should have attained her age of twenty-one, or be married, in trust to apply the dividends of the funds, in which the said sum of 12,000*l.* and the savings should be invested, for the benefit of *Elizabeth Callander* during the residue of her life for her sole and separate use, exclusive of her husband, &c.; and immediately after her death, in case she should leave any children living at her death, in trust to transfer the funds unto and among all such children, equally, to be vested in the sons at the age of twenty-one, in the daughters at that age or marriage; and in case there should not be any child, &c. in trust for the testator's daughter *Elizabeth Dutens*, and her grandson *Peter John James Dutens*, and their respective children, in the same manner, and subject to the same contingencies and limitations, as the original legacies given to them respectively.

The testatrix also gave to the trustees a subscription of 100*l.* in the *Irish* Tontine; upon trust, until her grand-daughter *Elizabeth Callander* should attain the age of twenty-one or be married, to invest the annual produce in Government or real securities, to accumulate; and, when she should have attained that age or be married, in trust for her separate use, &c.; and in case of her death before twenty-one or marriage, the savings during her minority to sink into the residue of the testatrix's personal estate. The testatrix then directed, that
Elizabeth

Elizabeth Callander should during her minority be brought up and educated under the care and direction of *Elizabeth Dutens*, and in case of her death by such persons as she should by Will appoint; and in case *Elizabeth Callander* should by any means whatsoever during her minority be removed from the custody and tuition of *Elizabeth Dutens* during her life, or of such persons as she should appoint, then the yearly sum directed to be paid out of the annual produce of the 12,000*l.* for her maintenance, &c. should cease; and the whole income accumulate upon the trusts before directed as to the savings.

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And it was thereby provided and declared, that if *Elizabeth Callander* should at any time marry, either during her minority, or after she should attain her age of twenty-one years, without the consent in the writing of the testatrix's said executors, in such case, instead of being permitted to receive the whole dividends or annual produce of the bequests therein before given to or in trust for her, as aforesaid, the testatrix thereby directed, that the sum of 400*l.* only should from thenceforth be paid to her thereout during the residue of her life for her separate use; and that in such case the residue of the dividends or annual produce of all such bequests so given for her benefit, as aforesaid, should after such marriage without such consent, as aforesaid, accumulate for the benefit of her children or other persons, who under the Will should become entitled to the capital upon the death of *Elizabeth Callander*; and, that if she should survive *Elizabeth Dutens* and *Peter John James Dutens*, and there should be a failure of issue of both, so that the whole fortune should centre in *Elizabeth Callander*, she and her husband, if the trustees should think fit, should take the surname and arms of *Dutens*; and, that her executors and trustees should in case of her marriage, if they should think fit, lay that injunction upon the husband and make it part of the stipulation.

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The testatrix made similar dispositions in favour of *Elizabeth Dutens* and *Peter John James Dutens*; with similar limitations over in the event of the death of either without leaving children to the survivor and *Elizabeth Callander*; and in the event of the death of her said daughters and grand-children she disposed of the three several sums of 12,000*l.* upon other trusts. She appointed her four trustees, Lord *Bulkeley*, Sir *Matthew White Ridley*, *George Bogg*, and — *Keate*, to be her executors; and by a codicil, taking notice, that she had the greatest opinion of the integrity of her executors, and not the least doubt of their care and attention, yet, as some of the objects of her Will were of very tender years, and the trusts probably of long duration, &c. for those reasons, and not from the least diffidence in her executors, she thought it more safe, as well for them as her daughter and grand-children, to have the direction of the Court of Chancery; and therefore directed a bill to be filed.

The testatrix died in *September* 1789; and a bill was filed according to the direction of the codicil. About the latter end of 1793, *George Dashwood*, Esq. paid his addresses to Miss *Callander*; who had not attained twenty-one, and his solicitor by his direction sent a letter to *George Bogg*, one of the trustees, dated the 16th of *November*, 1793, declaring his purpose to settle 6000*l.* on his intended marriage with Miss *Callander*; in trust for him for life; remainder to her for life; remainder to their issue, as he should by Deed or Will appoint; and for want of such issue to his executors and administrators; with a power to the trustees at his request to lay out

[ \*233 ] \* the money in a house or land to be settled to the same uses. *Bogg* communicated this proposal to the three other trustees; one of whom, Lord *Bulkeley*, sent an answer, containing the following passages:

“ I shall beg you to assure Miss *Callander*, that what—  
 “ ever

“ ever interests her own heart and happiness, and is  
 “ agreeable to Mrs. *Dutens*, cannot fail of not only being  
 “ very satisfactory, but very interesting, to me. I sin-  
 “ cerely wish her every happiness, and have no doubt,  
 “ she has made a very good choice. I have not the  
 “ pleasure of knowing the young gentleman: but I have  
 “ heard a friend of mine, the Marquis of *B.* speak with  
 “ much esteem of his father, Sir *John Dashwood*, and  
 “ his family. I shall remain here till about the 20th  
 “ of next month; and shall with very great pleasure  
 “ come up to town on purpose, in case any signing and  
 “ sealing is necessary by that time

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“ I have a perfect reliance, that, conversant in busi-  
 “ ness much more than myself, you will see, that in  
 “ matters of settlement the interest of Miss *Callander*  
 “ and any children she may have are fully attended to;  
 “ and that the trustees will have no difference of opi-  
 “ nion on that subject. I beg leave to assure you of the  
 “ extreme pleasure I feel in co-operating with you and  
 “ the other trustees, as well as Mrs. *Dutens*, in every  
 “ thing, which can tend to promote Miss *Callander's*  
 “ happiness.”

The answer of Sir *Matthew White Ridley*, another  
 of the trustees, contained the following passages:

“ I perfectly agree with you, that it would be well,  
 “ that the business between the young people should  
 “ be decided in some way. In the trust, which Mrs.  
 “ *Dutens* was pleased to place in us, I have always con-  
 “ sidered myself as bound to act towards the persons of  
 “ the young people in the manner, which the Court, to  
 “ whom their property was trusted, would have done, had  
 “ the whole vested there. The offer, which Mr. *Dash-*  
 “ *wood* makes, of settling upon our ward (in addition  
 “ to

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" to her fortune ) 6000*l.*, upon her and her children of  
 " the marriage, is, I think, very handsome; and, there-  
 " fore, if I rightly understand it, obtains my consent to  
 " the union. At the same time, it might not be impro-  
 " per, I think, to attend to the interest of the children  
 " during their father's life-time; as he is a very young  
 " man; and may probably live to see his children attain  
 " the age of 21, or marriage. Should the whole be  
 " locked up until his death? I suggest this merely as an  
 " idea, which may not be correct; and therefore submit  
 " it to your superior judgment, not as an obstacle, but  
 " as a doubt."

The two other trustees and Mrs. *Dutens* also ap-  
 proving Mr. *Dashwood's* proposal, a draft of settlement  
 according to that proposal was prepared, and sent to  
 Sir *John Dashwood* and his son; but Sir *John Dashwood*  
 being suddenly taken ill, and dying soon afterwards, the  
 settlement was not executed. After his father's death  
 Mr. *Dashwood* refusing to execute any settlement, the  
 trustees proposed a meeting; which he declined to at-  
 tend; and the trustees having another meeting, and  
 giving him notice, he did not attend: but his brother  
 attended, and on his behalf declared, he would not  
 make any settlement. Another meeting took place;  
 which Mr. *Dashwood* did not attend: but he represented  
 to the trustees, that he declined making any settlement  
 whatsoever. In consequence of that refusal the trus-  
 tees sent Mr. *Dashwood* the following notice, dated the  
 \* 18th of *March*, 1794: " As trustees appointed by the  
 " Will of the late Mrs. *Dutens*, for the security and  
 " preservation of the fortune left by her to Miss *Cal-*  
 " *lander*, and any issue she may have, we have taken into  
 " very deliberate consideration the application you have  
 " made for our consent to your intended union with that  
 " young lady; and we are under the disagreeable ne-  
 " cessity of acquainting you, that we think, it would be  
 " highly

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“highly inconsistent with the trust reposed in us, if we  
 “were to give our consent thereto, without a previous  
 “settlement being made by you, on such terms as, under  
 “the sense of the importance of that trust, we think  
 “right.”

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Miss *Callander*, having attained the age of 21 on the 20th of *March*, 1794, on the day following was married to Mr. *Dashwood*, without any settlement: but by indentures, dated the 24th of *May*, 1794, he settled 60*l.* *per annum* Long Annuities, and 1865*l.* 1*s.* 3*d.* 3 *per cent.* Consolidated Bank Annuities, according to his proposal.

Under these circumstances the bill was filed by Mr. and Mrs. *Dashwood*; insisting, that the consent of the executors was not necessary; that, if it was, the marriage was with their consent; and that, having once given their consent, they could not withdraw it; offering to complete the settlement, by settling 3000*l.* more; and therefore praying, that the Plaintiffs may be declared entitled under the bequest of the sum of 12,000*l.*, &c.; or, if the Court should be of opinion, that the marriage was without consent, claiming the 400*l.* a-year.

The trustees by their answer and depositions, being examined by the Plaintiffs, admitted the letters, stated in the bill, and their approbation of the intended marriage, and consent thereto, upon the terms of Mr. *Dashwood*'s proposal.

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By the decree, pronounced by Lord *Rosslyn*, on the 25th of *April*, 1796, it was declared, that the Plaintiff *Elizabeth Dashwood* was entitled to the sum of 400*l.* a-year under the Will. After the death of Mr. *Dashwood* a petition of re-hearing was presented by his widow; insisting,

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insisting, that she did not by her marriage under the circumstances forfeit any of the bequests under the Will. Upon the re-hearing, a letter from Mr. *Bogg* to Miss *Callander*, dated the 28th of *October*, 1793, which was not proved upon the original hearing, was offered in evidence, and permitted to be read *de bene esse*. That letter, after some warm expressions of regard, proceeded thus :

“ And when I add, as I think I am free to do, that
 “ your connexion with Mr. *Dashwood* is what I most
 “ cordially wish to see accomplished; I am sure, you
 “ will both feel my motives for urging you most cautiously
 “ to avoid any step, that may hereafter be said to have
 “ been taken without your aunt’s concurrence. Tell me
 “ therefore plainly, does she approve of my writing to
 “ Sir *Matthew*. If she does, I will write immediately.
 “ If she does not, then let me be candidly informed,
 “ whether, relying on each other as unalterable, you can-
 “ not be content to delay your union, till you are both
 “ of age; in which case, it will be time enough to apply
 “ to Sir *Matthew* in the winter; which I will cheerfully
 “ and personally do.

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“ I certainly do not expect you to write me word, that
 “ you will be married immediately: but I do expect, that
 “ Mr. *Dashwood* fully communicates to me, if that is
 “ the determination: in order that I may, with the con-
 “ currence of Mr. *Keate* and Mr. *L. Dutens* (who thinks
 “ with me, I believe, on this subject) adjust matters,
 “ that the world may not have cause to upbraid you of
 “ weakness, or acting clandestinely. Many and many
 “ are the reasons I could urge to induce you to wait.
 “ But I know the folly of any third person attempting to
 “ reason on such subjects. God, whose guidance you
 “ have hitherto relied on, will, I trust, direct you in
 “ your

"your determination on a matter so important to your future welfare."

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In the subsequent part of the letter, with reference to a coolness between her aunt and Mr. *Dashwood*, he says, the present is a trying moment: a moment of possible separation from every thing she holds dear; expressing his trust that Miss *Callander* will in no situation forget the obligations she is under to her aunt; and that Mr. *Dashwood* will prove his sense of the value of her virtues, by his attention to one, who has been the watchful guardian over them; and concludes with excusing his letter by his anxiety for her acting properly on this occasion.

Mr. *Romilly* and Mr. *Martin*, in support of the Petition of Re-hearing.

The letters of Lord *Bulkeley* and Sir *Matthew Ridley* are consents in writing to this marriage. Mr. *Keate*, another trustee, did not give a consent in writing; but it is proved, that he did explicitly consent to the marriage; provided a settlement should be made: so did the fourth trustee, Mr. *Bogg*; which appears by his letter, which has been found since the decree; and, though not proved in the cause, may now be used. The distinction upon that appears in *Wright v. Pilling* (35); * that upon an appeal from one Court to another, as from this Court to the House of Lords, no evidence can be produced,

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(35) *Pre. Ch.* 494; see 496. tion of re-hearing was taken
Amb. 90, and the authorities off the file on the express
referred to in *Wyatt's Prac.* ground, that it made a case
Reg. 34. Post, Vol. XIII, different from that, on which
423. *Buckmaster v. Harrop*, the Decree was founded, by in-
XIII, 456. 1 *Ves. & Bea.* 153. troducing circumstances, not
Walker v. Symonds stated before the Court at the time
from the Reg. Book, 1 *Mer.* of making that Decree. *Wil-*
37, in a note to *Wood v. Grif-* *liamson v. Hatton*, 9 *Price*,
fith: but in that case a Peti- 194.

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produced, that was not before the inferior Court: but upon a re-hearing you may produce, not only evidence, not produced before, but new evidence. That case was an appeal from the *Rolls* to the *Lord Chancellor*, which is considered as a re-hearing. *Hedges v. Cartdonnel* (36), is also an authority to the same effect.

• •  
 There is a case in *Viner* (37), establishing, that in these cases, if the substantial part is performed, equity will supply small deficiencies and circumstances. From the moment Mr. *Dashwood* wrote the letter, proposing a settlement, the marriage having taken place, he was as much bound in equity as if a settlement had been executed: the only condition annexed by the trustees was complied with; and the consent therefore is absolute, and could not be withdrawn, so as to affect the rights of the parties. *Farmer v. Compton* (38). *Daley v. Desbouvrie* (39). *Lord Strange v. Smith* (40), is as strong a case. *Mesgrett v. Mesgrett* (41). *Campbell v. Lord Netterville* (42). *O'Callaghan v. Cooper* (43). In all these cases it was held, that, as the settlement might be made afterwards, the consent must be considered absolute. Considering the grounds upon which Courts of Equity have proceeded, construing these conditions strictly, and holding that, if they are substantially performed, the literal performance is not to be regarded, the objection, that one of these trustees did not consent in writing, will not prevail.

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*The Lord CHANCELLOR.*

If there ever was a case, in which it was reasonable,  
 that

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|----------------------------------------------------------|------------------------------------------------------------------|
| (36) 2 <i>Atk.</i> 408.                                  | (40) <i>Amb.</i> 263.                                            |
| (37) 5 <i>Vin.</i> tit. <i>Condition</i> ,<br>87, pl. 6. | (41) 2 <i>Vern.</i> 580.                                         |
| (38) 1 <i>Rep. Ch.</i> 1.                                | (42) Cited 2 <i>Ves.</i> 534.                                    |
| (39) 2 <i>Atk.</i> 261. Cited                            | (43) <i>Ante</i> , Vol. V, 117.                                  |
| 2 <i>Ves.</i> 535.                                       | See <i>Stackpole v. Beaumont</i> ,<br>III, 89; and the note, 98. |

that the trustees should not consent, this is that case. The husband having obtained their consent by proposing a settlement, and immediately before the marriage refusing to make any settlement, they were justified in saying, they would not consent, unless he would make a previous settlement; which is the expression both of the letters and depositions. There are many cases, in which the trustees might, notwithstanding he was bound to make a settlement, refuse to consent without a previous settlement. It is impossible not to have a wish to relieve this lady: but I do not see my way to it. I will read the cases; and then say, whether it is necessary to hear the Defendants.

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*The Lord CHANCELLOR* directed the Counsel for the Defendants to proceed; observing, that it would be more satisfactory to the parties, that the cause should be heard through.

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*Mr. Richards*, for the trustees, observed, that the case of *Daley v. Desbouverie* appears very strong; but does not come up to this; and insisted, that the consent, which was absolutely necessary in this instance, was given by those trustees, who expressed it, subject to a proper settlement; and that consent, so qualified, was afterwards absolutely withdrawn; that the objection, that the trustees have no right to withdraw their consent, so as to affect the rights of the parties, is just, only if the consent is absolute; and, that it would be very dangerous, and a great inlet to fraud, to hold such a consent absolute, where perhaps the husband may neither have intended, nor have had the means to fulfil his engagement.

*Mr. Romilly*, in Reply.

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In all these cases a Court of Equity, not considering the letter so much as the substance, will not permit the

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the parties to suffer by the mistake of executors; and has even dispensed with the consent, where it has been unreasonably withheld; of which an instance is mentioned in *Peyton v. Bury* (44). Suppose the marriage had taken place immediately after the letter, containing Mr. *Dashwood's* proposal: the Court would have compelled him to make a settlement upon that letter, as an agreement. The marriage having taken place the day after Mrs. *Dashwood* was of age, will be considered for this purpose the same as if during her infancy. He could not possibly have availed himself of the circumstance, that she had been of age twenty-four hours. The trustees all insisted upon a previous settlement only under the impression, that without that he would not be bound. The connection was approved, and her affections engaged, with the consent of her friends; and the trustees had no objection, but, that he was not bound to make the provision, they erroneously conceived to be necessary. But he was bound in fact; and, that being their only reason, they must be considered as having consented; all, that they intended, being substantially done. I do not rely upon his offer by the bill to make a settlement: but, independent of that, he was bound to make a settlement; and she, by the marriage a purchaser of that settlement, is entitled to insist, that it shall be made. Questions of this sort have been considered in equity with great relaxation: the Court placing itself almost in the situation of the parent; considering, what the parties meant, and what ought to be done.

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... *The Lord* CHANCELLOR. ...

I have looked through all the cases upon this subject, with a very anxious wish to find a principle for reversing this decree, which I dare trust as a principle to govern future

(44) 2 *P. Will.* 626; see 628.

future cases; and though a review of the authorities has brought back to my mind many considerations, that formerly affected it in this case, I dare not say, this case will do within any such principle as the Court has acted upon. The case of *Daley v. Desbouverie* is extremely strong. I have looked at Lord *Hardwicke's* notes; and I have not been able to find any declaration of the principle, upon which that case was decided. His Lordship only states at the conclusion of the note (from which the circumstances of the case appear very much as stated in the Report) that he declared, that under all the circumstances the marriage ought to be considered as having been had with the approbation and consent of the trustees; and therefore the money was payable. Upon the whole Note it appears, Lord *Hardwicke* had satisfied himself of that, which I think extremely difficult satisfactorily to collect from the cases, that Mr. *Manley* wrote that letter, as the agent of all the trustees; and that, fairly construed, it was a distinct assent upon the part of all the trustees to the marriage: even, if the struggle they had agreed to make for a better settlement should not be effectual; thinking it their duty to struggle for a better settlement; though stating, that, if they should not succeed, they were obliged for the happiness of the young lady to give their consent. It is impossible to support that case, unless in Lord *Hardwicke's* opinion that was the meaning of that letter. I think, it is not the natural import of it.

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The case of *Farmer v. Compton* does not go the length of this by any means; for there was a consent to the settlement, not executed before marriage; and the Lord Chancellor says, that the marriage ought to be esteemed a marriage with consent of Sir *Henry Compton*, the father of the lady, "in respect there was an express consent of the said *Henry* both before and after the

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“ said marriage consummated, and no disagreement or
“ alteration of his good liking in the mean time.”

Consent to
marriage once
given shall not
be withdrawn
by adding
terms, that do
not go to the
propriety of
giving the
consent.

These are very material words; for it would be very dangerous, as a general principle, notwithstanding all the colour there is for saying, it has been acted upon, to hold, that, if at a particular time a person *in loco parentis*, as guardian, upon a conscientious sense of duty thinks himself required to give consent, and previously to the marriage is duly informed of circumstances, that ought to have operated at first to make him withhold his consent, if he has once given it, he shall not afterwards alter his mind. The cases have gone this length; that, if consent is once given, it shall not be withdrawn by adding terms, that do not go to the propriety of giving the consent. In *Lord Strange v. Smith* the question was, whether the Plaintiff was to have *jure uxoris*, an estate for life in real estate; or, whether, as the marriage was without consent, the rents were to be in trust for the separate use of the wife. It was not of much consequence; for probably in the latter case she would have given them to him. But the question was, whether the marriage was with consent. The evidence is detailed in Lord *Hardwicke's* Note; and it appears, the mother had expressly given her consent: the affections of the young lady were entangled, and afterwards, the propositions about a settlement not having been made the subject of any qualification as to the consent given, a new proposition was adopted; and, at last, the mother positively insisted upon a new term. The father of the Plaintiff was very averse from that; but at length

• consented, thinking it for their happiness; and then the mother of the lady, who seems to have been of a very perverse disposition, the moment that it was acceded to, said, her daughter never should marry into that family. Under these circumstances the *Lord Chancellor* was of opinion, and rightly, that, a consent having been given without

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without any condition, every thing reasonable agreed to, no fair objection, either of a moral, or a pecuniary nature; it was a fraud upon the affections of the daughter to retract the consent merely from caprice and perverseness. The case of *Mesgrett v. Mesgrett* was upon quite a different ground; viz. a gross fraud. The property was to go over to the daughter of one of the guardians upon a marriage without consent. He encouraged the proposal, and then affected to say, he had not given his consent, for the purpose of obtaining the property for his own daughter; and it was rightly said, *Qui facit consentire videtur*: especially in such a case, where he gave encouragement, and affected not to give his consent, for such a purpose. *Campbell v. Lord Netterville* does not govern this at all. In that case the House of Lords held, that, the marriage having been encouraged between the parents, till from the circumstances of one of them he could not give the whole of that 15,000*l.*, that should not be held a withdrawing of his consent to the marriage.

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In this case, upon the circumstances it is not possible for the Court, at the expence of so much as will be put in hazard, to gratify any inclination it may have to give the larger part of this fortune. It is expressly stated, that, if she marries either before or after the age of 21, without the consent of the four trustees, she is to have 400*l.* a-year; and the rest is to accumulate for those who are to take afterwards. Mr. *Dashwood* proposes to settle 6000*l.* Lord *Bulkeley* answers that * by a letter, importing, that, with reference to rank, character, and connection, that proposal was perfectly agreeable: but a fair construction of that letter puts it upon the other trustee to see, that the consent is followed by a proper settlement. Sir *Matthew Ridley* says expressly, the offer to make a settlement (for that is the term) obtains his consent. Strictly speaking, if the

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marriage on
the offer of a
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is sufficient.

authorities did not forbid that construction, the natural interpretation would be, that, if the settlement is made, the consent shall follow; and the mere offer will not do: but in many of the cases, though upon the treaty the intention seemed to be, that the settlement should be before marriage, a settlement after marriage has been held sufficient to satisfy such a conditional offer. While the father of Mr. *Dashwood* lived, the settlement was prepared. It was approved by the aunt of Miss *Callander*, if made upon the terms proposed; and Mr. *Dashwood* and his father approved the marriage and the settlement. Either Mr. *Dashwood* would not, or he could not, execute the settlement. In fact, before the marriage, and after the death of Sir *John Dashwood*, the trustees, who had given a consent, conditional in this sense, that the settlement was to be made either before or after the marriage, and in my opinion before, though, upon the intervening circumstances that makes no difference, call upon Mr. *Dashwood* to meet them. Though repeatedly called upon, he positively refuses; finding himself upon his father's death in circumstances, that did not admit of his executing a settlement according to the proposal. The trustees then say, this will not do: they are bound to attend to the interest of the lady; and all, that is hitherto done, was encouragement of the marriage, provided, they had a hope (I cannot put it more favourably) of having that settlement. But, when he distinctly refused to execute any settlement, it was not unreasonable in the trustees, or a parent, or

[*245] * this Court, in the place of a parent, to insist upon a previous settlement. It was put, strongly, that the trustees withholding their consent, because there was not a previous settlement, was under the ignorance of the Law, which would have compelled a settlement; and, if they had known that, they would have continued their consent. This case will not admit that; for that depended upon his ability; and their objection was, either

either that he would not, or, what is much more material, that he could not, make the settlement; and therefore the effect of the Law could not produce that beneficial situation for their ward; a power of attaining which was the condition of the original consent; her power of effectually attaining which was the reason of their continuing their consent; and the non-performance of the condition was a reasonable circumstance, upon which they would not permit the marriage without a previous settlement. Considering myself bound by the cases, yet I think some of them have gone a great length in fettering the fair exertion of parental providence in the case of marriage. The power of trying, how far the grounds are reasonable, upon which persons, thus entrusted by parents, have given, or withheld, their consent, is a very dangerous power for this Court to assume. But it has assumed that power. There is no one point of fact more difficult or delicate for a Court of Justice than the actual circumstances, under which trustees may conscientiously refuse to give consent; and yet be silent, unless compelled to speak. There is great danger, I admit, on the other hand, permitting him to withhold reasons, perhaps rashly and improvidently conceived. But, where reasons are stated, strongly appearing to be right, and which a parent might assign, it would be very dangerous to examine those with such a determination to think them good for nothing, as appears in some of the * cases. Upon the whole, I cannot reverse this decree without some principle, that will stand the test of general application; and, though I seriously wish I could, I dare not say, I have found such a principle.

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The Decree was affirmed.

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Aug. 27th.

See ante,

Vol. VII, 567.

Upon a Re-hearing the *Lord Chancellor* affirmed the Order

upon the point, that a purchaser, to avail himself of an outstanding Term against dower, must have procured an assignment, or at least a declaration of trust; or have got possession of the deed, creating the Term.

Upon the [*247] other question, though appearing not to be raised by the case, the *Lord Chancellor* expressed a clear opinion, that a general power of appointment over the whole estate may subsist in the same person, who has the fee-simple.

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THIS cause came before the *Lord Chancellor* upon a petition of re-hearing, complaining of the order (45), pronounced by the *Master of the Rolls*, sitting for the *Lord Chancellor*, allowing the exception, taken by the widow to the Master's Report.

Mr. *Romilly* and Mr. *Cooke*, in support of the Petition of re-hearing.

Upon the first question, as to the outstanding term, of which the purchaser did not take an assignment, it is admitted, that, if an assignment had been taken, that would have done. This must be contended by the widow, as a question of positive Law; requiring, as indispensably necessary, a merely formal act, an assignment by one trustee to another trustee; like the enrolment of a bargain and sale, &c. But this is not to be determined as a question of positive law: the question being merely, whether the Court will assist the widow, at Law clearly not entitled to dower, at least not until after the expiration of the existing term. If relief is to be given, it must be upon equitable principles. Your Lordship, following Lord *Hardwicke*, in *Swannock v. Lifford* (46), will not carry this farther; but will relieve in a case under circumstances precisely the same as in *Lady Radnor v. Vandebendy* (47). If this question is to be decided, not upon positive Law, but upon principle, what difference can an assignment by this trustee

(45) Reported ante, Vol. VII, 567.

Hill v. Adams. Ante, *Wynn v. Williams*, Vol. V, 130.

(46) Mr. *Butler's* note, 105. *Co. Lit.* 208 a. *Amb.* 6. 2 *Atk.* 208, by the name of

(47) *Show. P. C.* 69. *Pre. Ch.* 65.

tee to another trustee make? Much less can a mere declaration of trust by the trustees, which, it is admitted, would have the same effect as an assignment, make any difference. The case is anomalous; if the mere declaration of that, which, whether the declaration is made, or not, exists, viz. that he is a trustee for that person, for whom undoubtedly he is a trustee, can make the least difference in the right. Suppose, the purchaser could not possibly procure an assignment of the term: the trustee being a lunatic, or out of the kingdom, or refusing to assign. This was compared in the judgment to an assignment, to protect a subsequent incumbrancer against prior incumbrances: but that depends upon the absence of notice of the prior incumbrance by the subsequent incumbrancer, when he advances his money. The principle, upon which the Court proceeds in those cases, that the money was advanced without notice, distinguishes those cases. If the trustee is also a trustee for other purposes, besides merely holding the term to attend the inheritance, will the mere assignment of the term make the assignee a trust for those other purposes? The purchaser, contracting for the estate, virtually contracts for the term; which becomes his property. He may at any time call for an assignment: then why should he not permit the same trustee to continue a trustee for him? * The only use of the assignment is evidence of his intention to take the benefit of it: but the evidence from his paying the money is as strong. Lord *Hardwicke* does not in any part of the case before him state, that the term must be assigned; though that circumstance happened to occur in that case.

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Upon the second point, as to the execution of the power of appointment, the *Master of the Rolls* seems to rely upon the case of *Goodill v. Brigham* (48): a case, decided

(48) 1 *Bos. & Pul.* 192.

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decided upon grounds extremely questionable: that case going no farther than this; that, the legal fee being given, a mode of disposition inconsistent with the legal fee cannot be added; not applying to the mere reservation and execution of a power. The practice of conveyancers for a great length of time has relied upon this mode of barring dower; and the rule is so stated by Mr. *Butler* (49) and Mr. *Fearne* (50). In *Sir Edward Cleere's Case* (51) it was held, that the appointee came in, not under the appointment; but under the original title; and the execution of her power was merely instrumental. The limitation of the fee does not contain every mode of exercising authority over the estate. A power may be exercised in a different manner from that, by which the ownership of the estate may be conveyed. The word "appoint" would be sufficient alone, without words of conveyance. So a power may be executed by a Will without three witnesses. The distinction therefore, appearing in this judgment, that it may be by deed or Will, assumes too much in assuming, that the Will must have three witnesses, and a deed must contain the operative words. The effect of this is, that a use is raised; and, the power being executed, the purchaser is in under the original deed, not merely by the appointment; and consequently the dower is barred.

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I considered it perfectly settled by the cases upon partition after a devise, that, if the limitation is to such uses as the deviser shall appoint, and, in default of appointment, to him and his heirs, the circumstance of giving that power revokes the Will; and, if that power was not given, there would be no revocation. Those cases

(49) The note §30, Co. Lit. 379 b.

(50) *Fearne's Cont. Rem.* 509, 4th edit.

(51) 6 Cp. 17.

cases stand upon this; that the devisor gets, not only the fee in the estate divided, but a power, as well as an interest; which he had not before. I would not have heard this argued ten years ago; knowing personally, that this doctrine is directly contrary to the whole system of conveyancing, the constant course of Mr. *Booth*, Mr. *Pickering*, Mr. *Fearne*, Mr. *Holliday*, and all the great Conveyancers.

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Mr. *Alexander* and Mr. *Hart*, for the widow, in support of the Order, allowing the Exception.

The widow was entitled to come here against the trustee to have the term removed out of the way. It is laid down distinctly, that a trustee of a term to attend the inheritance is a trustee for all interested in the inheritance, according to their respective interests in it. If a partial interest is created, he is trustee for the person, having that interest, to that extent. If this widow had a jointure, he would be a trustee for her in respect of that; and upon the same principle he must be a trustee for the legal interest of the widow in respect of her right to dower. The Court must have given her the benefit of the term, as having the best right to call for it; according to Lord *Hardwicke's* opinion in *Willoughby v. Willoughby* (52): the case, upon which the Law on this subject principally depends. If the purchaser had used due diligence, by procuring an assignment of the term, or taking a declaration of trusts, there is no Law to take the benefit of it from him; and in the case of the widow certainly, for what reason is not very clear, whether he had notice, or not. Lord *Hardwicke* never states the rule without the limitation, that the purchaser has got an assignment of the term. In

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Willoughby v. Willoughby Lord *Hardwicke* puts (58) the very case :

“ Consider, how the right would have stood as between the Plaintiff Mrs. *Willoughby's* mortgage and the Defendant *Cripps's* mortgage; in case there had been no assignment of the old term to a new trustee for *Cripps*; but the legal estate had remained in *Skylling*, the surviving trustee in the first assignment, to attend the inheritance. In that case it would have been most plain, that Mrs. *Willoughby's* mortgage should have been preferred. Wherever the legal estate is standing out, either in a prior incumbrancer, or in such trustee, as against whom the puisne incumbrancer has not the best right to call for the legal estate, the whole title and consideration is in Equity; and then the general maxim must take place, *qui prior est tempore, potior est jure.*”

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Lord *Hardwicke* there must suppose, that *Cripps* had no notice of the former mortgage; and the passage shows his opinion, that between incumbrancers the question depends upon the better right to call for the legal estate; and that depends upon the diligence of the purchaser; and, if he does not guard himself by getting it in, the trust with reference to the interests in the inheritance remains, as before; and those prior interests in time have the better right. Accordingly by the universal practice, in order to protect incumbrancers upon the fee against mesne incumbrances, an outstanding term must be got in: if it is not, the mesne incumbrancer would have a right to consider the trustee as trustee for him; and might come into this Court to prevent the puisne incumbrancer from setting up the term against his ejectment. The form is, according to the manuscript opinion of an eminent conveyancer, to make the trustee assign specifically

(58) 1 *Term Rep.* 773.

specifically in trust for the purchaser. There is therefore great difference between a term outstanding, to attend the inheritance, and a term got in, to protect a purchase. The whole language of the judgment in *Swannock v. Lifford* shews, that distinction was in Lord *Hardwicke's* mind; who puts the case of a mortgage outstanding; and says, the widow would have a right to redeem; even where there is a purchaser. What difference arises upon the circumstance, that a third person has a charge upon the term? If she can come to redeem an outstanding mortgage, why cannot she come against a trustee of a term to attend the inheritance? In both cases there is a purchaser for valuable consideration; and the decree has the effect of giving relief against him, notwithstanding his valuable consideration. If the widow has not this right, the title to dower would soon be lost; for there is no estate without a term outstanding, either for a mortgage or other purposes. The answer to the case of a lunatic trustee, &c. is, that by the act of God, or other circumstances, the vendor cannot make a title independent of dower. It is to be wished, that the impediments to the means of disappointing dower were multiplied. In *Lady Radnor v. Vandebendy* Lord *Somers* decided, not upon the Equity, as being greater for the one than the other, but upon this; that the ordinary habit of conveying had been in this course; and the same principle prevailed in the House of Lords. The distinction of the case of *Swannock v. Lifford* is very fine, if it did not turn upon this merely; that the Court had resolved to go no farther. Lord *Hardwicke* expressly notices, that the term was taken in: and says distinctly, that he will adhere to precedent to that extent; but will not go farther. There is therefore his clear authority, that unless the term has been taken in, the purchaser is not to be assisted; but each party is to be left entitled to their respective equities,

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Upon the other question, it must be admitted, that a power and the fee may stand together: but the objection is, that there was no execution of the power. At least, it is necessary, that the husband should intend to execute, and the purchaser to take under the power. First, there is no legal execution of the power. Since *Sir Edward Cleere's Case* it has been considered a maxim, that, where a man has a power and an interest, and he does an act, which may take effect by either, it shall take effect by force of his interest; unless he shews, he intended to execute his power. Upon the face of this instrument it is clear, he did not mean to execute his power as to the estates not in settlement. He did execute it with regard to the estates in settlement: but as to the unsettled estates the recital is, that he is seised in fee: the words do not apply to an appointment under the power; and it is evident, he forgot, that the power applied to that estate. The ground, upon which a deed, purporting to convey an interest, is held an execution of a power, is merely to prevent the deed being wholly inoperative: not beyond that; and in this instance there is no occasion to resort to that principle.

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If there is no legal execution of the power, what is the equity? Both are purchasers for valuable consideration. If either has a better claim to assistance, the widow has; and, though by the rule of the Court notice makes no difference as to dower, it must be admitted, that it ought to make a difference. Supposing the power executed, that according to Lord *Alvanley's* opinion in *Cox v. Chamberlain* (54) cannot divest the interest, vested in the wife. In *The Duke of Marlborough v. Lord Godolphin* (55) Lord *Hardwicke* says, it is true, the appointee takes by the original instrument, but not from

(54) *Ante*, Vol. IV, 631; (55) 2 *Ves.* 61; see p. 78. see 636, and the note.

from that time : so here, he takes by force of the original instrument, but not as at the time of the execution of that instrument. That must depend upon circumstances ; and these fictions are not allowed to produce such an effect.

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Mr. Romilly, in Reply.

It is not correct, that the universal practice is to take an assignment of the term. According to the opinion of many eminent Conveyancers that is not necessary? What is meant by due diligence? Is it incumbent upon the purchaser to file a bill against the trustee? If so, and the Court would have decreed an assignment, upon what principle can that be, except that he was a trustee for no one but the purchaser? That marks the distinction between this case and the case of a prior incumbrancer ; in which certainly the Court would not decree an assignment ; and also with reference to the effect of notice at the time the money is advanced the cases are quite dissimilar. The difficulty is insuperable. If the trustee was trustee for the widow, how can the assignment of his trust, without the participation of the *Cestui que Trust*, make the assignee a trustee for other persons? It is true, Lord *Hardwicke*, whose language is certainly very accurate, speaks throughout his judgment of a purchaser, having taken an assignment of the term : but will your Lordship on that account make a decision without principle ; Lord *Hardwicke* having never stated his opinion upon such a case as this?

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Upon the second question, Lord *Alvanley's* opinion in *Cox v. Chamberlain* is expressed only as a doubt. In another of the notes (56) to *Co. Lit.* it is stated, that if a person limits his estate to such uses as he shall appoint, and in the mean time, and until he makes an appointment, to the use of himself and his heirs, the settlor and

(56) *Co. Lit.* 216 a. note 119.

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and his heirs have a qualified and determinable fee, until by an exercise of the power of appointment an use vests in the person, to whom it is appointed; and this is spoken of as one of the known, established, modes of preventing dower. There is no particular form of executing a power, unless it is expressed. It is sufficient, if the person, having the power, intends to execute it, or to do that, which cannot be done, unless he executes it. It is not necessary to refer to the power. The object of this instrument was to vest in the purchaser immediately an indefeasible estate in fee. How could that be done without executing the power? The interest passing would have been liable to be defeated the next moment at law.

The Lord CHANCELLOR.

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Three very important questions arise in this case. Upon the first, with all due respect to the decision in the Court of Common Pleas I must say, that case brings into question a doctrine, that both in principle and practice was clearly settled before: whether it is possible for a man to take to himself a power of limiting an estate by deed, will, writing, attested, as required; at the same time taking to himself the whole interest in the fee, over which the power is to be exercised. I am perfectly sure from my own experience, the practice was universal. It was an ordinary thing for a man, about to suffer a recovery of an estate, of which he was tenant in tail, to declare, that the recovery should enure to such uses, intents, and purposes, as he should appoint; and in the mean time, and in default of appointment, and as to so much of the interest, of which there should be no appointment, or, as should not be exhausted by the appointment, that the estate should enure to himself in fee; and the great names I have mentioned confirmed by their practice what Mr. *Butler* states; that the fee

fee vests until execution of the power (57), and the execution of that power, in the words of Mr. *Booth*, is the limitation of a use under and by the effect of the instrument, by which the power was reserved. It is true, the practice has left it almost without example, that the party does not also pass an interest, for the security of the purchaser; for by many acts, not disclosed, the power might have been gone. When therefore the vendor recites his power, executes it, and conveys by feoffment, bargain and sale, or lease and release, he does profess both to execute his power and to pass his interest; and many cases might be put. Suppose, the lease for a year was not executed, having been forgot; or had not a proper stamp: the release would have no operation: but the execution of the power would have limited a use to the persons named; and the use would engraft itself upon what Mr. *Booth* calls *Scintilla Juris* in the re-lessees; and those persons, named in the execution of the power, would have taken, precisely as if they had * been persons, to whom uses were limited in the original deed. Take the ordinary case of a marriage settlement, with a power to the tenants for life of leasing during minority. A power in the tenant for life to lease for twenty-one years is almost as inconsistent with his interest as a power to limit the fee with that of tenant in fee. But, when the tenant for life executes the power, the effect is not technically making a lease: but that lessee in fact stands precisely in the same relation to all the persons named in the first settlement, as if that settlement had contained a limitation to his use for twenty-one years, antecedent to the life estate and the subsequent limitations.

It cannot be represented as a question of any doubt, that such a power may be reserved to the person, having the

(57) Ante, *Smith v. Lord* 661. V, 748. See the notes, *Camelford*, Vol. II, 698. III, Vol. I, 309; II, 706.

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The execution of a power of appointment operates by way of limitation of a use under and by the effect of the instrument reserving the power: the fee vesting in the mean time.

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Distinction as to the effect of a partition upon a Devise. If the conveyance goes no farther, [*257] the Devise is not revoked; as it is, if he takes the divided estate with a power of appointment.

the fee; and is capable of being executed. The extent, to which the contrary proposition would go in affecting titles, is surprising; and therefore the statement of any doubt upon it is alarming. In *Sir Edward Cleere's Case* it is laid down expressly. All the cases, applicable to the question of revocation of a devise by the effect of a partition are wrong, if there is any ground for this doctrine; for, though it has been supposed very difficult to distinguish the cases of *Tickner v. Tickner* (58) and *Luther v. Kidby* (59), the distinction is obvious. In the one the object was a mere partition: the deviser, having an undivided moiety of the estate, took a divided moiety; and it was held no revocation: there being no purpose beyond partition. But, where a partition is made, and in the mode of doing it the deviser conveys to such uses as he shall appoint; and, in default of appointment, to himself in fee, that is a revocation: why? Because he had limited a power. They inferred, that it was legally limited: otherwise there would have been no difference in Law between the one and the other. This was recognized in the case of *Kenyon v. Sutton* (60), before Lord *Alvanley*, when Chief Justice of *Chester*; and the Will was held revoked; as the deviser had taken a fee, with a power, over-riding it, to limit a use; and is not only sanctioned by practice, but really has its foundation in principle, acknowledged by the Courts for the last 2 or 300 years. As to the conclusion of the judgment, in this case, where the *Master of the Rolls* seems to think, there is some peculiarity from the limitation to such uses as *Robert Maundrell* should "by Deed or Will" appoint, there is no such thing; for the Deed or Will to create a Use,

(58) Cited in the Reports 106; and the notes, II, 437. of *Parsons v. Freeman*, Amb. VI, 201.

116. 3 Atk. 741. 1 Wils. 308. (59) 3 P. Will. 170, note. 8 Vin. 148.

See as to the Law of Revocation, ante, *Harmood v. Oglander*, Vol. VI, 199. VIII, 601. (60) Cited ante, Vol. II,

a Use; to ingraft upon the seisin of the re-lessees under the old instrument, may be a Deed or Will, that passed no interest whatsoever. There is no difficulty in proving, that in fact thousands of securities in this country have their foundation in nothing but the execution of such a power. Upon this part of the case, if nothing else occurs, that can be stated as a legal question, I should not act with the firmness, that ought to be expected from me in matters of title, if I should send that question elsewhere; and not take upon myself to say distinctly, I have not a doubt upon it.

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The next question is, whether in this case the power has been executed. The authority of *Sir Ed. Cleere's Case*, as well as all general doctrine, seems to furnish this; that it is not necessary to recite, that he means to execute the power; if the act is one, that he can do only by that authority. Though the form may not at first suggest, that he proposes to exercise it, the purpose of the act makes it necessary to hold, that he did intend it. On the other hand, it is in general clear, where a party has both an authority and an interest, and does an act, purporting to mean to pass the interest, he shall be held to intend that, and not to exercise his authority. The tenor of this instrument is not only such as that he may be supposed to intend merely to pass an interest, but peculiarly so; for it recites the power over one estate, and his interest in that estate; and as to that estate expressly in exercise and by virtue of his power, recited, and all other powers and authorities, declares, the former conveyance should remain, continue, and be, to such uses, &c.; and then he goes on by lease and release to pass his interest in those estates. Having also this estate, and in it both a power and an interest, he does not execute his power, as he did as to the other estate; but passes his interest; as he did in the other estate. This is not therefore the mere ordi-

Not necessary to recite an intention to execute a power, if the act can be done only by that authority.

But where the act purports to pass the interest, it shall be considered so intended, and not to exercise an authority.

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nary case; but affords this additional inference; that, where he meant both to execute his power, and to pass his interest, he has done both. It is said, as to that, his purpose required him to do so, for two reasons: 1st, he meant, the estate should pass free from dower: but then it is objected, that there is a covenant against dower. The answer to that is, that it is a sort of surplusage, if the estate is not subject to dower; but a prudent precaution, lest it should be subject to dower. There is also an answer from *Swannock v. Lifford*; for in that case also there is the same covenant against dower. Another answer, as to the purpose to have it free from dower, is suggested by the circumstance, that *all the Conveyancers, concerned in the preparation of this instrument, thought, that, the term having been assigned to attend the inheritance, there was little or no danger of dower.

But it is then said, there being a conveyance of the interest, subject still to the existence of the power, this must be taken to be an execution of the power, as well as a passing of the interest: otherwise he might by executing his power destroy the interest. The answer to that is, that his power is gone. When he passes his whole interest, the power, though not exercised, is destroyed. But, if there is any reasonable doubt upon that, it is purely a legal question; and might be disposed of in a case, stated to a Court of Law.

Whether it will be necessary to have that question discussed or not, depends upon another point; upon which, with great deference to the authority of Lord *Hardwicke*, and of the *Master of the Rolls* in this cause, I doubt at present, whether it is possible upon principle, to say, the assignment of a term, that has been once assigned to attend the inheritance, is necessary from time to time; whenever that inheritance is made the subject of

of purchase. If it is true, that the law of the Court was decided to be such at the time by Lord *Hardwicke*, and has been since understood to be so, that must prevail. But it is necessary to be perfectly satisfied, that Lord *Hardwicke* did consider the law as settled in that case; and, that it has since been so understood. The way, in which it strikes me at present, is this. It has been long settled, that there is a distinction between a term in gross and a term to attend the inheritance. Where the term is created for a particular purpose, and that purpose has been satisfied, if the instrument does not provide for the cesser of the term, when that purpose is satisfied, the term remains without any object, to which it is to be applied; and the beneficial interest in it is a creature of Equity, to be disposed of and moulded according to the equitable interests of all persons, having claims upon the inheritance. When that proposition is established, it seems quite obvious, that, where the persons, claiming subject to the term, claim all under contract, whether there is an assignment of the term, or not, as to those, who stand behind, *Qui prior est in tempore potior est in jure*; and the trustee of the term is a trustee for them according to their priorities; and in *Willoughby v. Willoughby* Lord *Hardwicke* has mainly intended to establish, that there is no difference, whether the term was originally expressed to attend the inheritance, or not. But when the mode of conveyancing had created terms in many estates, and, persons dying, it was difficult to find representatives, and it turned out in fact, that a term was existing, it was not known where, and the dealing with the estate became dangerous, as a legal title, could not be obtained, therefore it was very early decided, that if *A.* and *B.* advanced money innocently,

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Distinction
between a
Term in gross
and a Term to
attend the in-
heritance.

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Rule between
incumbran-
cers, that a
subsequent in-

cumbrancer, without notice, and having as good a right, getting in the legal estate, by assignment of a Term, or possessing himself of the deed creating it, is protected.

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cently, and C. bought also innocently, not having notice of each other's advances, he, who first had the luck to get in the legal estate, had as good a right as any one; and should hold by his legal title the possession against the prior equities; and it was decided in *Willoughby v. Willoughby*, that, to place them in that situation, he must have a clear conscience, and as good a right; and he must either get in the legal estate, or possess himself of the deed, creating the term, which Lord *Hardwicke* admitted would do (61).

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Distinction between the cases of dower and a mesne incumbrance as to the effect of notice; preventing the preference by getting in the legal estate in the latter case; not in the former.

Afterwards came *Swannock v. Lifford*. *Lady Radnor v. Vandebendy* established, that, where a person purchases the inheritance, and there is an outstanding term, he may deal with the trustee of the term; and it is added, * that the trustee may deal with him; and upon payment to the owner of the inheritance, with full and complete notice of the dowress's title, the trustee, who before was trustee for her and her husband, having also distinct notice of the title to dower, they may defeat her title. There is a very important difference between the cases of dower and a mesne incumbrance. All Lord *Hardwicke's* reasoning in *Swannock v. Lifford* goes to the difference between persons claiming under contract and under legal title; and he lays down generally, as a principle he should wish to see established, that the legal titles should take their chance; and the Court would not interfere, even to put dower out of the way. It is clear, those cases do not furnish the same question; for Lord *Hardwicke* lays down, and there is no doubt, that, if there is notice in the case of the incumbrancer, you cannot deal for the legal title; and Lord *Hardwicke* goes much farther; that the trustee, having notice, cannot deal with you. There is therefore a clear distinction

(61) Post, *Ex parte Knott*, Vol. XI, 609. XV, 335, 6. *Frere v. Moore*, 8 Pri. 475.


inction between the cases. Then the general doctrine, that, he who takes from the trustee with notice, is himself a trustee, introduces a difficulty to say, if the trustee, having an estate expressly declared to attend the inheritance, is a trustee for all, who have interests in the inheritance, in this sense, that he is a trustee for the dowress, and also for him, who has the inheritance, subject to his wife's right of dower, having distinct notice of her right, and the purchaser also having notice of it, he may by a simple assignment create an estate, not subject to the same equities; though only a transfer to another trustee to attend the inheritance.

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To consider it farther: how would it stand, if the husband entered into a contract to sell the whole; not contracting for more than to make a good title; no specialty about dower; but the Master's Report was in *favour of the title; on the ground, that a term was outstanding, which might be assigned. The Court would make the purchaser take the title; as the trustee might convey. If the Court would assist them to defeat the dower by creating another trustee to attend the inheritance, if decision has established, that there must be that idle ceremony, we must abide by it. But what is the principle, that supports such a decision? The question comes to this; whether, because Lord *Hardwicke* has used the terms, that are found in that case, importing, that an assignment of the term was made, if there has been no assignment, the principle shall not be applied.

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Before I decide this cause, I wish to see the deed; and I must also know, where is the possession of the deed, creating the outstanding term; from respect to that *dictum* of Lord *Hardwicke*, that the term could not be set up against the purchaser, if he had used the diligence to possess himself of the deed, creating the term.

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term. Some use has arisen from this discussion, with reference to the doctrine, as to setting up satisfied terms in Courts of Law; which was shaken about twenty-one years ago; and was brought back by Lord *Kenyon* to its true principles (62).

Upon inquiry it appeared, that neither the deeds creating nor assigning the term were delivered to the purchaser. There was a mortgage upon the estate at the time of the purchase; and all the title-deeds remained in the possession of the mortgagee.

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The Lord CHANCELLOR.

Upon looking into the instrument of *March* 1791, recited in the Conveyance of 1795, the limitation is not, as stated in the Master's Report, to such uses as *Robert Maundrell* should "by Deed or Will" appoint; but, to such uses as he should, by any instrument in writing sealed and delivered in the presence of two credible witnesses or by his last Will appoint. I mention the circumstance; as the judgment at the *Rolls* lays some stress upon it. The probability is, that this instrument was executed, to put the inheritance in such a state, as, the parties thought might probably prevent the wife's having Dower; according to what Mr. Justice *Heath*, a Judge, eminently versed in the knowledge of conveyancing, states (63) in the case of *Cave v. Holford* (64); representing, that this species of conveyance, to such uses as a man should appoint, and, for default of appointment,

Conveyance to such uses as A. shall appoint, and, for default of appointment, to him in fee, a mode used to prevent dower.

(62) See *Doe* on the demise of *Bristowe v. Pegge*, 1 Term Rep. 758, n. *Doe* on the demise of *Hodsdon v. Staple*, 2 Term Rep. 684. *Doe* on the demise of *Da Costa v.*

Wharton, 8 Term Rep. 2. Ante, Vol. VI, 184.

(63) Ante, Vol. III, 657.

(64) Ante, Vol. II, 604, n. III, 650. IV, 850.

pointment, to him in fee, was a mode used by conveyancers to prevent dower (65). I doubt, whether the fact is stated correctly in the Master's Report, that the premises not comprised in the deed of 1756, were, as well as those comprised in that deed, conveyed by the deed of *March* 1791. It is not material, whether the fact is so, or not; attending to the conveyance to the purchaser.

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With respect to one point, made at the *Rolls*, not very material, appearing at the close of the judgment, and with reference to which I mentioned the mistake in the Master's Report, if the general doctrine can be maintained, that the owner of the estate may have a power over the whole estate, there is no difference whatsoever, * whether the power reserved was to be executed by instrument in writing, or by Deed or Will; for a conveyance by deed, and an appointment by deed, are quite different instruments in their nature and the consequence of law. An appointment by deed is nothing more than an instrument in the nature of a deed; that is, an instrument sealed and delivered. But a deed of conveyance passes the interest in the subject conveyed. The former instrument does not so operate; for the execution of such a deed is, to speak technically, a limitation of a use; and the moment the use is limited by the execution of the power, it knits and attaches itself to the seisin left in the feoffees, grantees, and re-lessees, under the old instrument; so much, that, if the appointment is made to *A.* to the use of *B.* the former is the *Cestui que Use*, and *B.* only has an equitable estate. No difference therefore arises upon that.

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The execution of a power of appointment operates as a limitation of a Use; attaching upon the seisin in the feoffees, &c. under the old instrument.

The general question, whether a power of appointment can subsist with the fee, can hardly be contended, when

(65) Since decided against case, *Ray v. Pung*, 5 *Madd.* the claim of dower in such a 310; and 8 *Barn. & Ald.* 561.

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Ground of the distinction, as to the revocation of a De-
vise, between a Partition merely, and with the addition of a Power of appointment.

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when we recollect, that in *Tickner v. Tickner* a tenant in fee, making partition, and taking an estate to the use of such person or persons as he should by Deed or Will appoint, and, in default of appointment, to himself in fee, was held to have revoked his Will; on a ground, that is utterly inconsistent with the doctrine, that the owner of the estate cannot reserve a power of appointing, by way of declaration or limitation of a use upon the older instrument; for the very ground of that decision was, that the effect of the transaction was something more than giving himself the fee in a moiety of the estate divided: viz. that in addition he had the power of appointing and limiting the estate, without making any conveyance of his interest; and it is very difficult to make out, that there is any other difference between that case and *Luther v. Kidby*; where no such power was reserved (66). Having formerly attended very much to considerations of this nature, I read the case of *Goodill v. Brigham* with great surprize; and am certain, the doctrine there stated must have startled all persons, much habituated to the ordinary forms of conveyancing. Whenever there was an intention of serving the immediate convenience of the person, who suffered recoveries, or levied fines, in order to get the dominion of the estate, the universal practice was, with a view to save expence, to limit to such uses as the party should appoint; and it was considered, that the deed of appointment would operate as a sufficient limitation of the use under the old instrument of conveyance; and the purchaser would have taken; if there was no doubt whatsoever upon the fact, whether the power had not been suspended, or extinguished. The question as to the prudence of it with reference to that is another thing: but, subject to that, the execution of the power would have given a good title to the person, who by the execution

(66) Ante, Vol. VIII, 284.

eution of it became the *Cestui que Use* under the instru-
 ment, creating the title. In the case in the Court of
 Common Pleas Mr. Justice *Le Blanc*, then at the bar,
 gives a definition of a power, which is approved and
 adopted by Mr. Justice *Buller*; that a power is that do-
 minion, which one person acquires over the estate of
 another; and Mr. Justice *Buller* proceeds to say, that, if
 the estate was limited to such persons and uses as she
 should appoint, and, for want of appointment, to her
 and her heirs, until she made an appointment, she
 would have no estate. That is not the Law. The
 Law is, that, where there is a power to *A.* to appoint,
 and, till he makes an appointment, or, for want of
 appointment, to him and his heirs, the fee in the mean
 * time is vested in him, as that qualified fee, to yield to
 the estate, to arise out of the execution of the power,
 upon *Leonard Lovies's Case* (67), and all the authorities
 downwards. In that case it was held, that until the
 appointment the fee vested in him, as so much of the
 use of the former conveyance, not declared; and there-
 fore vesting in the author of the conveyance. It is
 more correct to say, this sort of power is a mode, which
 the owner of the estate reserves to himself, or gives to
 another person, through the medium of the Statute of
 Uses, of raising and passing an estate. I had some
 conversation with Lord *Alvanley* upon this; who, in *Cox*
v. Chamberlain enters a strong protest against this doc-
 trine; but stating his doubt, whether it is sufficient to
 bar the dower of the wife of that husband, who had
 the fee. I collect from the passage, to which I have
 alluded, what is Mr. Justice *Heath's* opinion upon that,
 and from Mr. *Butler's* note the opinion of the convey-
 ancers; and I am reasonably sure of the opinion of other
 conveyancers, now no more. But, upon that latter
 question,

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Power of ap-
 pointment does
 not prevent the

fee
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 ing, subject to
 be divested by
 execution of
 the power.

Such a power
 is a mode,
 which the
 owner of the
 estate reserves
 to himself, or
 gives to an-
 other, through
 the medium of
 the Statute of
 Uses, of rais-
 ing and passing
 an estate.

(67) 10 Co. 78. See ante, 748; and the notes, I, 309.
Smith v. Lord Camelford, II, 706.
 Vol. II, 698; III, 661; V,

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question, considering the doubt expressed by Lord *Alvanley*, and the very respectable doubt of the *Master of the Rolls*, whatever may be my own inclination to think, that according to the true operation of these powers, when once executed, they drive out all intermediate estates, are prior and paramount to them, and the dowress cannot sustain her claim of dower upon the new estate, in the appointee of the power, as the *Cestui que Use*, named in the conveyance, limiting the power, and as if named in that deed, it would be too much for me to have said, if with regard to the estates, not comprized in the settlement, this power should appear to have been executed, that upon the ground of any opinion I entertain I would * not permit the party to take the opinion of a Court of Law upon that point.

I should with much more reluctance at this day have sent to Law, to be reconsidered, the question, whether such a power could be reserved to the owner of the fee; knowing the practice, and seeing what is in the books; though, feeling great respect for the opinion of the Court of Common Pleas, diminished only by former authorities, *Sir Edward Cleere's Case*, and what is stated by Lord *Hardwicke* as to the different modes of giving to a woman a power over her estate, by creating a trust, or reserving a power over a use, recollecting what is the constant practice of reserving such powers, and also the doctrine of partition, upon which it has been repeatedly held, that, as that power was reserved, the Will was revoked, a partition otherwise not being a revocation, perhaps I should, if it had been asked, have permitted it, though contrary to my opinion; which I now declare. In *Cox v. Chamberlain* there was great difficulty upon this part of the case. The estate was given by a multitude of words, thrown together; not by a distinct execution of a power, and a regular conveyance of lease and release, but a chaos of words. The question

question was, whether the instrument was an appointment or a conveyance. If the party takes by the execution of a power, he clearly takes a legal estate, exactly as if the limitation had been inserted in the prior instrument. But, if he takes by lease and release, then there is a re-lessee, as well as a *Cestui que Use*; and, if it is contended, that the instrument operates, not to pass an interest, but, though in the shape of a lease and release, as an execution of a power of appointment, you do not sufficiently guard against the difficulty, whether the power has been suspended or extinguished; which * difficulty remains upon all the cases, and all the reasoning; as may be observed in Mr. *Butler's* notes (68).

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I have said thus much, not as being necessary to the decision of this case, but, as it is not unfit to express, that my opinion, going along with that of Lord *Alvanley*, cannot yield to this new doctrine, that a power to appoint uses cannot be reserved to the owner of the fee: nor can I make out, that there is any difference, whether it is to be executed by deed or Will, or by an instrument, not having the qualities necessary to those instruments. But it is not necessary to consider this point; for the conveyance to *Henry Maundrell*, the purchaser, recites the settlement of 1756, and the instrument of *March* 1791, that raised the limitation to such uses as *Robert Maundrell* should appoint: leaving it uncertain, whether the Master's Report is accurate in stating, that other estates, besides those comprised in the settlement of 1756, were conveyed to those uses; but proceeding to execute the power of appointment only as to the estates, comprised in the settlement of 1756; and as to those estates and the estates, not comprised in that settlement, conveys both by lease and release. The latter class of estates therefore did not pass to

(68) *Co. Lit.* 216 a. note 119. 379 b. note 330.

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to *Henry Maundrell* by the deed, as an execution of the power in any sense; and then there is no necessity to decide, what would be the effect of that deed, if it did comprise the lands, not in the settlement of 1756, as well as those, which were comprised in it. It is difficult to ascertain, not upon the Master's Report, but in the recital of this deed, that all the lands, after granted and released, were comprehended. If they were, the question of dower would be the same as to *both classes of estates. That fact is to be ascertained. Another circumstance is, that the mortgage to *Tyler* from the recital appears only to be a demise by appointment under the execution of such a power as that, the legality of which we have discussed. Upon the whole, we must dismiss from the case all, that relates to this question; which I should not have touched, but on account of its great importance to the law of conveyancing.

The next question is, whether, a term having been once assigned to attend the inheritance, in a former transaction, which touches the estate, made the subject of a subsequent purchase, where the purchaser takes a conveyance of the inheritance, but does not deal in any manner with the term, he can say as against the widow, she is not entitled to dower out of that inheritance; and upon this ground; that, the term, having been once assigned to attend the inheritance, is to be considered always as assigned to attend the inheritance; and the effect in Law and Equity is precisely the same, as if that subsequent purchaser had got in the term: viz. as if he or his trustee had possessed themselves of the instrument creating the term, and made the trustees, in whom it was vested, parties to his conveyance, declaring, they would hold it for him; or, as if he had done the more marked act, calling upon them to make an assignment in trust for him, and to attend the inheritance,

ance, purchased by him. Upon this point, the *Master of the Rolls*, upon great consideration, in a most able and luminous judgment, decided against the opinion of the Master. I felt great difficulty upon the argument to make consistent, nor can I now make consistent, with any rational principle the doctrine, that the purchaser shall be protected in the one case, and not *in the other. It would be an improper use of the time of the Court to state the general doctrine as to satisfied terms. It is more useful to refer to *Willoughby v. Willoughby*, *Swannock v. Lifford*, and the judgment, that has been given in this case, than for me to repeat the principles, that regulate the enjoyment of these terms. I collect from all the authorities, that, when the purposes of the trust are once satisfied, in equity the ownership of the term belongs to the owner of the inheritance, whether declared by the original conveyance to attend the inheritance, or not. It is not unusual to insert that express declaration in the original conveyance. It is not uncommon to omit that. But, whether it is inserted or not, the doctrine of equity is the same; that the term will attend the inheritance. As to other persons, having interests in the inheritance, as contradistinguished from the dowress, that is very largely treated in *Willoughby v. Willoughby*. It is clear from that case, that, if there is a mortgage of the inheritance, and a prior mortgagee, of whose title the other has no notice, if the subsequent mortgagee can get in a term, satisfied, or, according to the later cases, not satisfied, by an assignment to trustees for him, he can protect himself against the prior incumbrancer; unless there are circumstances, that give that incumbrancer a better right to call for an assignment; as there may be: for instance in a case determined by Lord *Cowper*, where the trustees of the term joined in a conveyance

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When the purposes of the trust of a Term are satisfied, the Term belongs in equity to the owner of the inheritance; whether declared by the original conveyance to attend the inheritance, or not.

Rule between incumbrancers, that a subsequent incumbrancer, without notice, getting in a Term, may protect himself: unless there are cir-

cumstances, giving the prior incumbrancer a better right to call for an assignment.

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inheritance. But in the case of *Swannock v. Lifford* Lord *Hardwicke* takes the House of Lords to have so decided; upon the ground, that in those very circumstances and that precise case the Court is bound, not by a principle, upon which it can well reason, but by a practice of conveyancers, found to be inveterate, that to that length it will go; and that it will not go farther. At least my opinion is, that the ground, upon which the *Master of the Rolls* decided that part of the case is right; and therefore I confirm that.

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STANSFIELD v. HABERGHAM.

Dec. 4th, 5th.

Heir, entitled by way of resulting trust until the determination of an event, upon which future contingent estates were to arise, restrained from cutting timber.

SAMUEL HILL by his Will, dated the 5th of October, 1759, duly executed to pass real estate, concerning as well all his copyhold lands at *Sowerby* and *Wakefield*, (which he had surrendered to the uses as he by his Will should declare) as also all his freehold lands in the County of *York*, gave and devised the same, and all his interest therein, to *George Stansfield* and four other persons, in trust, subject to a provision to raise money by sale or mortgage for payment of his debts and legacies, in aid of his personal estate, as therein mentioned, and for other purposes, that the said trustees should receive the yearly rents and profits thereof during the life of his son *Richard Hill*, or until his grand-daughter *Betty Nuttall Hill* should attain her age, or be married; upon trust to pay and apply the same to her at her full age or marriage, which should first happen; and in case she should die before her full age or marriage, then to pay the same in such manner as therein after-mentioned and after the marriage of his grand-daughter, or her attainment of full age, the testator directed, that his said trustees should convey all his said real estates, (so remaining

maining unsold) unto *Betty Nuttall Hill* and her assigns during her life without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to her sons and daughters in strict settlement; with remainder to the use of such person or persons, and for such estate or estates, as he by any deed or instrument, to be executed by him, and attested by two or more credible witnesses, should direct, limit, or appoint.

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By a deed-poll, dated the 6th of *October*, 1759, executed as required by the Will, the testator, reciting the Will, in pursuance of the power, to him reserved, as aforesaid, directed and appointed, that the trustees in his Will named, and the survivor of them and his heirs, should immediately after the death of his grand-daughter and her failure of issue convey and assure all his said real estate, so remaining unsold, unto the first and other sons of the body of his son *Richard Hill* by any woman, except *Anne Wylde* and every other daughter of *Edward Wylde*, successively in tail male; with remainder to the daughters of *Richard Hill*, as tenants in common in tail; with remainder unto the right heirs of the survivor of his said trustees, his heirs and assigns for ever.

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The testator died on the 22d of the same month. In 1772, *Betty Nuttall Hill* died without issue. Her father *Richard Hill*, the only son and heir at law of the testator, died in 1780; at which time *Stansfield* was the only surviving trustee. Considerable litigation took place upon bills by different parties, claiming as heirs at law against the trustee; and by the final decree, pronounced upon the 25th of *July*, 1793, it was declared, that *Martha Habbergham* and *William Wylde* were entitled to the freehold estate, as co-heirs at law, subject to the charges thereon in proportion to the copyhold

1804. estates ; and that the copyhold estates were well devised
 STANSFIELD by the Will and the said deed-poll or codicil ; and
 v. upon the death of *George Stansfield* his heir at law,
 HABERGHAM. or customary heir, would be entitled to such copyhold
 estates, subject to the payment of a proportionate part
 of the charges ; and that in the mean time the heirs of
 the testator were entitled to the rents and profits
 during the life of *Stansfield* ; and a conveyance of the
 freehold estates was directed. Under that decree *Ha-*
 [• 275] *bergham*, in right of his wife, and *Wylde*, received the
 rents of the copyhold estates.

This bill was filed by *Stansfield* against the son and
 heir of *Habergham* and his wife, the trustees under
 her Will, and *Wylde*, for an injunction to restrain the
 Defendants from cutting down any timber or other trees,
 and committing any other waste ; and the question as to
 the right of the heir to cut timber, came on upon a mo-
 tion to dissolve the injunction, that had been obtained
 by Mr. *W. Agar*, for the Plaintiff.

Mr. *Romilly* and Mr. *Ainslie*, in support of the Mo-
 tion.

It is difficult to reconcile the opinion, appearing to have
 been expressed by Mr. Justice *Wilson* in the beginning
 of his judgment (70) upon *Habergham v. Vincent* (71),
 that the heir must take every thing not expressly dis-
 posed of, with what he is afterwards (72) represented to
 have said, as to the conveyance to be directed, that
 he should have only an estate *pur autre vie* ; in which
 Mr. Justice *Buller* appears to have concurred. As to
 copyhold estate there could be no difficulty in a surren-
 der to the use of the heir, until there should be an heir
 of the surviving trustee, and then to the use of him
 and his heirs.

The

(70) *Ante*, Vol. II, 224, 225.

(72) *Ante*, Vol. II, 229.

(71) *Ante*, Vol. II, 204.

The questions are, 1st, whether, if a legal estate descended upon the heir, with an executory devise over, a Court of Equity would restrain the heir from cutting timber: if not in the case of a legal estate, 2dly, whether the Court would interpose, if an equitable estate only descended to him? 3dly, Whether it will interpose under the circumstances in which the Plaintiff stands?

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HABERGHAM,

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Upon the first question, which is very important, no rule has been more attended to, than, that an heir at law is not to be disinherited, except by express declaration or plain inference. No case ever called more for *favor*, (according to the usual expression) than this: an heir disinherited in the most capricious manner. But the Plaintiff must shew, by what law the heir cannot exercise his right. No decision can be produced; and the mere *Dictum* of the greatest Judge is not sufficient to carry the jurisdiction of a Court of Equity farther than it has ever gone before. In the case of *Robinson v. Litton* (73) by the judgment, that has been read (74), Lord *Hardwicke* seems to have gone upon the intention of the testator, and upon the circumstance, that the heir was by the testator made trustee for other persons; and was therefore not to be permitted to exercise that power, he was to have as trustee, to the disadvantage of the *Cestui que Trust*. The *Dictum* of Lord *Hardwicke*, according to Mr. *Joddrell's* note, is certainly an express authority in favour of the injunction: but that *Dictum*, as far as appears, dropt from Lord *Hardwicke* without argument of Counsel, or objection stated upon the point; and from the Report in *Atkyns*, which in this instance

(73) 3 Atk. 209.

from Lord *Hardwicke's* and

(74) The judgment was
read by the Lord Chancellor

Mr. *Joddrell's* notes.

1804.

 STANSFIELD
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instance seems to be more accurate, something more must have passed. It is there stated thus :

“ Suppose the case of an executory devise, as in
 “ *Gore v. Gore* (75) : I should doubt, whether the heir
 “ at law ought not to be restrained from committing
 “ waste in the mean time.”

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Taking it then to be doubtful in such a case as *Gore v. Gore*, that is no authority ; for in that case nothing descended to the heir but the reversion expectant upon the term ; and if he cut timber, it must have been by collusion with the trustees of the term ; who might have kept him out. It was not an immediate interest, descended to the heir, as in this case the fee ; which may by possibility last for ever. The difficulty is to conceive, how the jurisdiction of Equity has grown up : upon what principle, where an estate has descended to an heir at law, a Court of Equity can say, he shall not exercise that power, which by the law he has ; the whole fee, with all its incidents having fallen upon him. These are matters of positive law.

Next, upon the point, whether the Court will interpose in the case of an equitable estate, what is there to warrant the distinction between the legal and equitable estates ? In Equity the person who has the equitable interest, is treated precisely as if he had the legal estate, having a right at any moment to call for the legal estate ; and that, which ought to be done, being considered as done.

The 3d question is, whether this Plaintiff stands under circumstances, that admit of his filing this bill : a trustee in possession filing the bill against his *Cestui que Trust* ? for, until the event happens, upon which the estate of the

the Defendants is to be divested, he remains a trustee for them. In *Mogg v. Mogg* (76) Lord *Thurlow* would not restrain a mere trespasser, cutting timber; though there are instances in the case of a mine.

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STANSFIELD
v.
HABERGHAM.

The Lord CHANCELLOR.

Supposing, the question as to dissolving this injunction were independent of the form of the suit, I should hesitate long, if the consequence of holding, that the heir takes, and necessarily takes, all that the deviser has not given away, would be, that he would have a right in the consideration of this Court to cut timber. Upon the case of *Robinson v. Litton*, into which I have looked, I am bound to conceive, that was not the opinion of Lord *Hardwicke*. A good deal was admitted by the very eminent Counsel, who argued that case, as clear law, that would go far to govern this; and I should by dissolving this injunction contradict what has been understood to be the doctrine of this Court; that, where there is an executory devise over, even of a legal estate, this Court will not permit the timber to be cut down: more especially not, if there is an executory devise of a trust estate. It cannot be denied, that upon this subject the Court has greatly abridged legal rights. But, if this protection were not given, it would be very easy to disappoint the intention in almost every settlement, by deed or Will, as to timber. Suppose the ordinary case, upon marriage, a person, making himself tenant for life, not expressing it to be without impeachment of waste, with remainder to trustees to preserve contingent remainders, to the first and other sons in tail, and to the heirs of the father, in the usual manner. That

Where there is an Executory Devise over, even of a legal estate, this Court will not permit timber to be cut: more especially in the case of a trust estate.

Trustees to preserve contingent remainders not to permit tenant for life or years by the destruction of

(76) 2 *Dick.* 670. See *Courthope v. Mapplesden*, post, 290, and the references.

that estate to bring forward a remainder to himself or another, for the purpose of cutting timber.

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last

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last limitation, the father having an estate for life, would vest in him; and, if he destroyed his estate for life before the birth of any child, there would not be any person with an equitable interest but himself, or with a legal estate, except the trustees, *pro hac vice* for him, with a trust to preserve contingent remainders, that might never arise. It would be much stronger, if the father was made only tenant for 99 years; which is * often done very prudently: and the very object is to prevent his acquiring the fee without the interposition of a trustee, even with the concurrence of a son, having attained the age of 21; for in both those cases, unless upon the principle, that he shall not by anticipation have the benefit of his estate in remainder, how could they prevent his cutting timber? In many cases it might be worth his while to destroy the estate for life; and insist that he had in Equity the whole inheritance in himself. But upon the principle, on which in *Garth v. Cotton* (77) a party was not permitted to bring forward the estate of a remainder-man, in order to get the timber, the Court would say, the trustee to preserve contingent remainders should not permit the tenant for life by the destruction of the estate with regard to which he was liable to impeachment for waste, to make use of that legal estate, bound by a trust for him, and also for contingent remainders, that may never arise, for the purpose of cutting timber.

If this doctrine can be maintained, it is a surprise upon the understanding, that has prevailed for many years in this Court, even with regard to executory estates at law. But the case now before us, independent of the form of the suit, and the character of the Plaintiff, is one, in which particularly this ought not to be done; for upon the

(77) 1 *Dick.* 183. 3 *Atk.* 751. 1 *Ves.* 524, 546.

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the true and just consideration of this case, whatever may be said in other cases as to the nature of the estate in the heir, and admitting all the principles, that have been pressed, this heir at law has not in the contemplation of this Court, either at Law or in Equity, an immediate estate of inheritance, in a sense, that would entitle him to cut timber. I subscribe fully to what Mr. Justice *Wilson*, followed by Mr. Justice *Buller* and Lord *Rosslyn*, says very correctly; that whatever is not *disposed of in Equity results to the heir, as at Law. Mr. Justice *Wilson* speaks of the form of the conveyance. Mr. Justice *Buller*, with some variation, follows him; and Lord *Rosslyn* proposes to mould it according to their advice. But it would still remain to be considered by the Master, whether the idea they all of them meant to express is correctly, sufficiently, and accurately, expressed. With reference to that consider the Will. The trustees are directed to make a conveyance; which is very material. If there had not been an express disposition of the intermediate rents and profits, they would clearly have belonged to the heir; and, though that interval of enjoyment might probably be shorter than the lives of all the trustees, yet the question upon the right of the heir in that immediate period would have been precisely the same. If there had been three witnesses to the latter instrument, the effect would have been as to the freehold estate, as it was with regard to the copyhold, that *Stansfield* in Equity was bound to make a conveyance, that would effectuate the Will, thus expressed; and this Court could not possibly refuse its aid to the capricious purpose of the devisor; if it can be so represented. On the other hand, this Court would be led by a principle, short of favour, for it is at last but a principle of justice, to take care, that what was not given away should go, because not given away, to the heir. But *Stansfield* would have been guilty of a breach of trust, if in the execution of that, which he was directed

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 Whatever is not disposed of in Equity results to the heir, as at Law,

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directed to do, he had made any conveyance, vesting in the heir at law any estate, different in its nature, or better in its privileges and incidents, than was consistent with the purpose of the testator as to all other persons, with reference to whom the conveyance was directed. As to the freehold estates, the trustee was bound to make a conveyance, limiting them, after the failure of issue of the grand-daughter, as there was then a contingent remainder, so as to vest in some person the legal interest during the lives of the trustees, and the survivor, to give that person, not the beneficial interest, but an estate, the benefit of which would result, as every thing undisposed of would, to the heir; but an estate, bound by a trust to preserve the contingent remainder, if it should ever take effect. Lord *Thurlow's* reasoning in *Harrison v. Naylor* (78), when he said, the limitation would be to the heir male of *Elizabeth Harrison*, if she should have one, his heirs and assigns, and, if she should not have an heir male, then to the heir of the testator, his heirs and assigns, was more correct than that of Mr. Justice *Wilson*. The proper mode of executing the purpose would not have been, as put by Mr. Justice *Wilson*, to have limited to the heir at law an estate *pur auter vie*: that is, for the lives of the trustees, and the survivor; as, if that was a legal estate, there would have been nothing to prevent the heir in certain circumstances and events creating a forfeiture of that estate *pur auter vie*, before the contingency took place. It would therefore have enabled the trustee to defeat the very conveyance directed to be

(78) 3 *Bro. C. C.* 108. See inaccurate language of the ante, Vol. II, 234, 235. In a Decree, as it stands in the subsequent branch of that Register's Book, in the cause, at the *Rolls*, after limitation to *Thomas Naylor*, Trinity Term, 1795, the Master of the *Rolls* noticed the "and his heirs in tail male."

be made. In *Robinson v. Litton*, until the contingency happened, the son had the whole estate. If this Court would not have interposed to prevent cutting the timber, that would have been an undue mode of executing the conveyance; and the Court ought to have taken care, that the heir should not have such a legal estate as would enable him to destroy the contingent remainder to the heir of the surviving trustee; and * the consequence is, some legal estate should have been interposed in some person or persons, to preserve the estate, in case the contingency should arise; who might, according to *Garth v. Cotton*, prevent waste.

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v.

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There is no difference as to the copyhold estate; for, though it is true, the estate of the Lord will preserve contingent remainders, I am not prepared to say, it is as clearly his duty, as it is the duty of trustees to preserve contingent remainders of freehold estate, to interpose actively to prevent waste; and, though the trustees to preserve contingent remainders are sometimes omitted in limitations of copyhold estate, both by settlement and Will, they are frequently created by express limitation; and, whatever may be the case as to the lord, if trustees are created by express limitation for the purpose of preserving contingent estates, they would be guilty of a neglect of their duty, by permitting a tenant for life, liable to impeachment for waste, or a tenant *pur auter vie*, who by the nature of his estate is liable for waste, to destroy that part of the estate; viz. the timber. In this particular case the Court ought so to mould the conveyance directed, as to make it impossible for the heir to cut timber; and, if that can be maintained, it is not necessary to go into the general doctrine. I cannot distinguish much between *Robinson v. Litton*.

The estate of
the Lord will
preserve con-
tingent re-
mainders of
copyhold es-
tate.

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Litton (79) and this case. Lord *Hardwicke* there considers the heir at law as a trustee; and argues, that the intention of the testator could not be, that he should cut timber. It is very difficult to maintain that; for, if the right of cutting timber is incident to his legal estate of inheritance in the mean time, I should have felt myself compelled to admit, that the legal estate had all its incidents; and an intention, that he should not cut timber, must be shewn. It is impossible to argue upon the situation of the estate, in a county where there is much timber. If, where the heir is himself the trustee, he shall not cut, until it is seen, whether the contingency happens, or not, he cannot be in a better plight, where some one else is trustee both for him and others in the event; and a duty attaches upon that trustee, which he must attend to, not only as to the heir, but also as to the others. It would have been difficult for Lord *Hardwicke* upon any principle, that would stand the test of scrutiny, to have denied the doctrine he stated; which I represent only as the strong inclination of his opinion; for I am confident, that in this case the Court ought to have taken care in moulding the conveyance to protect the estate of the heir of the surviving trustee by the interposition of an estate to preserve contingent remainders; and this Court would then have considered it their duty to prevent any one, claiming either upon the doctrine of resulting trust, or an undisposed interest at law, from cutting timber. The Court ought also to have made *Stansfield* himself that trustee; for the deviser having put it upon him to execute the duty of preserving that contingent remainder, I think,

(79) It was observed at the Bar, that it did not appear, whether the son in that case was the eldest or only son, and therefore heir. The Lord Chancellor said, though that did not appear, from Lord *Hardwicke's* notes it was probable, that he was the eldest son.

I think, the most accurate way of enabling him to execute that trust, is to leave as much as was necessary for that purpose in the trustee, to whom the deviser confided the whole.

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STANSFIELD
v.
HABERGHAM.

It is another question, whether the Court is to grant an injunction; depending upon many considerations. If the conveyance has been made, as it ought, *Stansfield*, * being made trustee to preserve contingent remainders, would clearly have a right to file a bill for an injunction: if not, he would not have any right to file this bill himself. But, if really this heir has under the circumstances no right to enter, I will not decide the question of form, until I am informed, what has been done in consequence of the decree.

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It was then stated at the Bar, that no conveyance had been directed, upon which *The Lord* CHANCELLOR said, *Stansfield* had the legal estate in him; and was better entitled to preserve the timber than a trustee to preserve contingent remainders; and it would be too strong to dissolve the Injunction against so much of understanding and opinion as had prevailed.

DOLDER v. THE BANK OF ENGLAND.

1804.
Dec. 6th, 7th,
Amendment
of Exceptions
permitted
upon mistake,

MR. BELL, for the Plaintiff, moved to amend exceptions to the answer; upon a clear mistake, there being two causes; and the exceptions being taken from one bill instead of the other.

Mr. Richards, for the Defendant, opposed the motion; alleging, that there was no instance of amending exceptions.

The

1804.

DOLDER

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The BANK of
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The Lord CHANCELLOR.

Answer not
taken off the
file upon mis-
take, but a
supplemental
Answer per-
mitted.

The general practice is, that the Court will up to a certain stage amend the record, where there is something to amend by; and where it appears to be by mistake. I am struck with the circumstance, that no case has been found, in which this Court has permitted Exceptions to be amended. But if the course is, as it certainly is, to permit the record to be taken off the file, and a fresh record to be put upon it, I would rather abide by that than introduce a new course. In proceedings upon oath, where there is a clear mistake, an answer has, by leave of the Court, been taken off the file, and a new answer put on it: but Lord *Thurlow* adopted a better course, not taking the answer off the file; but permitting a sort of supplemental answer to be filed: that course leaving the parties the effect of what had been sworn before, with the explanation, given by the supplemental answer (80).

A fresh notice of motion was ordered to be given for liberty to take the Exceptions off the file, and to except *de novo*. But the next day upon the authority of *Bancroft v. Wentworth* (81), the *Lord Chancellor* gave leave to amend.

(80) *Jennings v. Merton College*, and the note, ante, Vol. VIII, 79. *Wells v. Wood*, post, 401.

(81) *Bancroft v. Wentworth*, 2d May, 1791. In Chancery.

The Plaintiff for the purpose of instructing his Counsel in drawing exceptions to the answer sent him by mistake the original draft of his bill, instead of another draft, from which the bill was en-

grossed; which differed materially. The mistake not being discovered, till it was too late to rectify it, the Plaintiff applied to the Court for leave to amend his Exception, or, that he might be at liberty to except *de novo*; and the Court ordered, that he should be at liberty to amend his Exception, paying the expenses. See *Boyd v. Mills*, post, Vol. XIII, 85.

BURROWS'S CASE.

1804.

Dec. 14th,

15th.

MR. *ROUPELL* moved, that a petition, praying, that a Commission of Bankruptcy may be resealed, should be set down; stating, that a mistake was made in the name of the bankrupt; which stood in the Commission as *Burrows*; the name being really *Burrow*; that the attorney, who sued out the Commission, being a young man, took upon himself to alter the name by striking out the letter "s;" that the Commission had been opened, and the party was declared a bankrupt under it. The petition farther stated, that the attorney had acted innocently; was sensible of the impropriety of what he had done; and mentioned it to the Commissioners; who advised this application; and the Attorney offered to re-stamp the Commission, and pay all the expence of that, or of a new Commission.

The Lord CHANCELLOR.

When once a Commission has been opened, and acted upon, the rule is inflexible, that it cannot be altered (82). This morning upon an innocent mistake of a name I allowed an alteration, stating in my own hand, that the Commission had not been opened. Till then it is a sort of escrow. I will do what I can to save expense; as this is an innocent case; otherwise I should treat it very differently.

The next day the *Lord CHANCELLOR* ordered the Commission to be superseded, with liberty to take out another Commission, directed to the same Commissioners.

Dec. 15th.

(82) *Ex parte Thompson*, ante, Vol. IX, 207, and the note, 208. *Fisher's Case*, ante, 190.

1804.
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 CLAYTON  
 v.  
 GRESHAM.

[ \*289 ]

To obtain pay-  
 ment to the  
 representative,  
 the mere pro-  
 duction of the  
 Probate is not  
 sufficient.

Proof of the  
 death is now  
 required; and  
 that the tes-  
 tator was the  
 party in the  
 Cause.

not that, which the Court would require. In this in-  
 stance there may be a settlement, or an agreement,  
 affecting from the moment of this lady's marriage the  
 interest as well as the principal of this property; and, if  
 an application had been made to this Court, where she  
 had become entitled upon her marriage, without an an-  
 tecedent title, this Court would never have ordered the  
 interest to be paid to her, unless satisfied, not only of the  
 marriage, but also, that her right under the antecedent  
 instrument had not been altered; requiring affidavits,  
 not only, that there is no actual settlement, and that  
 \* there is no agreement for a settlement; and that the  
 person named in the register of the marriage is the  
 person named in the Will, and the party in the cause.  
 The *Accountant-General*, on the contrary, has a person  
 to swear to the marriage; and goes on without any far-  
 ther guard. So, where money is ordered to be paid to  
 A. or his representatives, the constant course upon pay-  
 ment to creditors, upon an application to the Court itself  
 by petition the death must be proved; and the produc-  
 tion of the probate will not do. Then can it be right,  
 that the *Accountant-General* is not to have the same  
 proof; that the Court shall require one sort of evidence,  
 and its officer another? I remember the origin of the  
 additional proof here; an application after the death of  
 tenant for life; in which I was Counsel. An affidavit was  
 produced. Lord *Thurlow* asked, how he was to know,  
 that person was the party in the cause; and required an  
 affidavit of that. That was an alteration of the practice;  
 though a very provident one; for the next day that  
 affidavit was produced before Sir *Thomas Sewell*; in  
 whom that very circumstance, as being unusual, pro-  
 duced a suspicion of the truth of the fact. The *Ac-  
 countant General* feeling a difficulty, I cannot agree,  
 that evidence is sufficient, which upon an application  
 to me I should not think sufficient. A short affidavit,  
 that there is no settlement, will give you the money  
 immediately:

Immediately: but, though on the one hand I am much afraid of this practice, on the other, I am apprehensive of making a precedent, that will create great expence.

1804.

CLAYTON

v.

GRESHAM.

*The Lord* CHANCELLOR.

Whatever it may be fit to do in future, I do not think it proper to delay this case. But, making this Order, I desire it to be understood, I do not pledge myself as \* to what may be ordered in future cases, till I shall have consulted the *Master of the Rolls*. In this instance the property is given to the separate use of this Lady, I observe, with more than usual strictness, in very peculiar terms. The affidavit must be amended; and must state, not only the fact of the marriage, but that the interest of this fund is not affected by any settlement or articles; and then you may take the Order.

Dec. 15th.

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The Bank *Bonus* must be laid out: the interest to be paid to her in the same manner( 86 ).

(86) *Paris v. Paris*, ante, 185, and the note, Vol. IV, 802.

COURTHOPE v. MAPPLESDEN.

1804.

Dec. 19th.

A MOTION was made by a landlord for an injunction to restrain cutting and removing timber, and committing any other waste: the Plaintiff charging collusion by the Defendant with the tenant.

Injunction against a trespasser, cutting timber by collusion with the

Mr. tenant; without prejudice

to the case of mere trespass.



1804.

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COURTHOPE

v.

MAPPLESDEN.

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Mr. *Hollist* and Mr. *Leach*, in support of the Motion.

Though in *Mogg v. Mogg* (87) an injunction under these circumstances was refused, Lord *Thurlow* very soon afterwards, in *Hamilton v. Worsfold* (88), altered his opinion; and granted the injunction. There was in that case no privity of estate between *Worsfold* and the Plaintiff. The old rule was, that if a tenant suffers a third person to come upon the land, and cut timber, he is himself guilty of waste. This case is the same: a person without right, after the tenant has attorned, coming upon the land without the privity of the landlord, and cutting timber: it is waste in both. The utmost the Plaintiff could do is to go and carry away the timber; suffering all the disadvantage of having it cut at an improper time. He cannot go upon the land, to stop another person, cutting timber.

The

(87) 2 *Dich.* 670.

(88) In Chancery, *November* 1786.

This case was stated from a note, by Mr. *Romilly*.

The bill stated, that the Plaintiff was seised in fee; that his title had but recently accrued; and the tenants had not yet paid him any rent; that the Defendant *Worsfold* pretended to have some claim to the estate; and had given notice to the tenants to pay their rent to him; that he had entered upon the estate with the permission of the other Defendants, the

tenants; and had cut timber; and threatened to cut more. The bill therefore prayed, that *Worsfold* may be restrained from committing waste; and that the tenants may be restrained from permitting it.

The Lord CHANCELLOR, upon the motion for [the Injunction, at first had some difficulty about granting it; *Worsfold* being a mere trespasser: but at length his Lordship granted the Injunction against both *Worsfold* and the tenants. *Register's Book*, A. 1786, folio 1.

The Lord CHANCELLOR.

1804.

I have no difficulty in granting the injunction in this case: but I will not be bound as to what is to be done upon a mere trespass (89); though it is strange, that there cannot be an injunction in that case to prevent irreparable mischief: the rather, as there is a writ at Common Law to prevent the farther commission of waste during the trial; whereas, if the Court will not interfere against a trespasser, he may go on by repeated acts of damage, perfectly irreparable. But the ground in this case is, that the trespass partakes of the nature of waste more than in general cases: the tenant colluding; and if the tenant's act is waste, the act of the other must have so much of the quality of the tenant's act as to make it the object of an injunction.

COURTHOPE
v.
MAPPLESDEN.
Writ of waste
at Common
Law.

(89) See ante, Vol. VII, 307, 308. *Mitchell v. Dors*, VI, 147, and the note.



MORTLOCK v. BULLER.

[292]

1804.

Dec. 7th, 10th,
12th, 24th.

THE bill was filed for the purpose of obtaining the specific performance of a contract for the sale of an estate at *Isleham*, in the county of *Cambridge*, to the Plaintiff *John Mortlock*, under the following circumstances:

The Court is not bound to decree a specific performance in every case, where it will not set aside the contract; nor to set aside every term contract, that

By the settlement, dated the 5th of *March*, 1799, previous to the marriage of *John Buller*, Esq. and *Elizabeth Yorke*, the estates at *Isleham* were limited, subject to a

it will not specifically perform.

Under circumstances, that would have amounted to a breach of trust, inadequacy of consideration, arising from gross negligence of the agent, and a want of due authority, the bill was dismissed; though the Plaintiff was unimpeached; without prejudice to his remedy at law.

1804.

MORTLOCK

v.

BULLER.

term of 99 years, in trust to raise 200*l.* a-year pin-money, to be paid to the separate use of Mrs. *Buller*, to the use of *John Buller* for life without impeachment of waste; remainder to the use of Lord *Hardwicke*, *Charles Yorke*, and *James Buller*, and their heirs, during his life, in trust to preserve contingent remainder; remainder to *Elisabeth Yorke* for life, without impeachment of waste; remainder to the same trustees for 2000 years, upon trust to raise portions for younger children; and, subject thereto to the use of the first and other sons of the marriage in tail male; remainder to the use of *John Buller*, his heirs and assigns for ever.

The settlement contained a power to the trustees at any time or times at the request and with the approbation of Mr. and Mrs. *Buller* during their joint lives, or of the survivor, to be testified by some deed or writing, to be sealed and delivered by them, him, or her, in the presence of and attested by two or more witnesses, to sell or exchange; and it was declared, that the trustees should with the consent of Mr. and Mrs. *Buller* or the survivor, and after the decease of the survivor at the discretion of the trustees, apply the money arising from the sale, in the first place, in paying off the incumbrances, and afterwards lay out the residue in the purchase of other lands, to be settled to the same uses,

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In the summer of 1800 the trust estates were advertised for sale by auction on the 24th of *September* in fifteen lots; unless the whole should be disposed of by private contract before the 8th of *September*: and by the printed particulars it was declared, that the purchaser should pay a deposit of 15*l.* per cent.; and sign an agreement for payment of the remainder of the purchase-money on the 31st of *December* next. The Plaintiff *John Mortlock* having applied to the auctioneer, a meeting

meeting took place with Mr. *Buller*; who asked 26,500*l.* for the purchase. *Mortlock* offered 26,000*l.*; which was declined by Mr. *Buller*; until he should have consulted his friends. By a letter, dated the 3d of *September*, the auctioneer informed *Mortlock*, that no less sum would be accepted; in consequence of which *Mortlock* the following day by a letter to the auctioneer declared himself ready to accede to the terms proposed; and his agent accordingly on the 9th of *September* paid the deposit to the auctioneer, and signed the contract for the completion of the purchase; and the auctioneer signed a receipt for 4975*l.*, the deposit in part of 26,500*l.*, the purchase-money.

1804.
MORTLOCK
v.
BULLER.

The answers of the trustees represented, that, Mr. *Buller* expressing his wish, that the *Isleham* estate should be sold, Mr. *Yorke* generally signified his inclination to concur in such a measure, if it were thought advantageous for the trust: Mr. *James Buller* said, that he should be ready to concur in the wishes of his brother upon that subject; and Lord *Hardwicke* answered, that, if Mr. *Buller* should think it advantageous to part with the estate at that time, there would be no difficulty in obtaining the consent of the trustees. The trustees did not any farther interfere in the proceedings towards the sale; which was conducted under the sole authority of Mr. *John Buller*; but a draft of the conveyance was approved by Mr. *James Buller* on behalf of himself and Mr. *John Buller*, and on behalf of the other trustees by their Solicitor. The trustees, however, in *December* 1800, being informed, that *Mortlock* had made a large profit by his bargain, and had actually contracted for the re-sale of part of the estate for several sums, amounting to 34,900*l.*, leaving a considerable part undisposed of, refused to concur in the conveyance. Upon that re-sale the purchasers were but seven in number; and the money was to be received by instalments in the course of

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of the year 1801. The circumstances, under which the value of the estate was fixed, were these. In the spring of the year 1800 Mr. *Buller* applied to the auctioneer to survey the estate; and advise him of the value and the best mode of selling. In *June* and *July* the auctioneer represented, that he had surveyed the estate; and, according to his own evidence, that it was worth at least 28,000*l.*; but, if from 24,000*l.* to 27,000*l.* should be offered, a consultation should take place; and he would before the auction value it again, as then divided into fifteen lots. In the beginning of *September* 1800 the auctioneer again surveyed the estate in person: the former survey having been made by a clerk; and the amount of the second valuation was 33,386*l.* That valuation was first produced to the solicitor of Mr. *Buller* in the beginning of 1801: the auctioneer having never before communicated the fact to Mr. *Buller* or any other person.

After the answers were put in Mrs. *Buller* died; not leaving any children. A supplemental bill was filed; claiming the relief against Mr. *Buller*.

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The *Solicitor General*, Mr. *Richards*, Mr. *Wilson*, and Mr. *Hart*, for the Plaintiff.

The defence to this bill rests upon inadequacy of consideration and misinformation as to the value of the estate; imputing, not any fraud to the Plaintiff, but want of care and attention, and mismanagement, to the agent of the Defendant. Inadequacy of value may with other circumstances raise a presumption of fraud; but in a transaction like this, the conduct of the purchaser unimpeached, no advantage taken of youth, distress, &c. no relation or confidence between them, the Defendant consulting those, qualified to give him the best advice, every circumstance removing, instead of raising, suspicion, mere inadequacy cannot induce the Court to withhold

hold a specific performance. What constitutes inadequacy of price? Where is the line to be drawn? Upon a subject so vague, indefinite, and uncertain, it is impossible to draw any rule. In the last case of that nature, *White v. Damon* (90), your Lordship affirmed Lord *Rosslyn's* decree; but upon a very different ground; that the only witness was interested; holding upon the other point, that the discretion must be exercised upon principles, that will bear the test of application to other cases; and in the first decree Lord *Rosslyn* even felt the necessity of taking into consideration some circumstances of an equitable nature; observing upon the place and time of sale. In *Mortimer v. Capper* (91) Lord *Thurlow* mentions a case, where the consideration was only one-tenth of the value, and yet a specific performance was decreed. Reverse the case; and, if any principle of this nature exists, suppose, more than the value was given by a purchaser: the answer would be, *Caveat emptor*: he must look to the estate; and the same principle must apply to the other party to the contract. In *Griffith v. Spratley* (92) the words of Lord Chief Justice *Eyre* were, that inadequacy is certainly a badge of fraud; but is in itself no solid ground of relief. Can the Court sit to judge of the proportion: that is, of the degree of convenience to one party, and inconvenience to the other, resulting from the performance of the contract? Suppose a contract for the whole cargo of a ship: could the objection, that it had been disposed of by retail at a considerable profit, be maintained? It did not suit Mr. *Buller* to treat with the tenants for the separate parts; and the objection is merely, that the retail price has turned out more productive than the wholesale.

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(90) *Anto*, Vol. VII, 30; page 158. *Anto*, Vol. I, 219.
see the note, VIII, 137. *Post*, XIII, 103.

Burrowes v. Lock, *post*, 470.

(92) 2 *Bro. C. C.* 179, n.

(91) 1 *Bro. C. C.* 156; see

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wholesale. A Plaintiff has as much right to the performance of an agreement, if fair, and within the rules of the Court, as to any other relief. It is regulated by the same sort of discretion, depending upon precedents and rules established; and the Court has for 150 years been in the habit of exercising this jurisdiction. The principle is stated clearly in *Bettesworth v. The Dean and Chapter of St. Paul's* (93).

But, if inadequacy would do, it is not made out; for the re-sale by the Plaintiff was in a very different manner, and upon very different terms from those, upon which he purchased: a sale in lots: no deposit; with all the hazard, attending such a mode of sale; and accommodation given as to the payment. The difference may also be accounted for by the circumstance, that the re-sale was to the tenants upon the spot; most likely, not merely upon the *Pretium affectionis*, but having an interest, to give a higher price.

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As to the circumstances, under which this relief is sought, by the death of Mrs. *Buller* without children the interest of the trustees is gone; and the Plaintiff is entitled to the benefit arising from that accident: but, if the interest under the trust is not to be considered as out of the question, having given Mr. *Buller* a right to act for them, they are bound by his acts.

Mr. *Romilly* and Mr. *Leach*, for the Defendant,
Mr. *Buller*,

Admitting, that this agreement is perfectly fair, that no fraud, misrepresentation, or misconduct, can be imputed to the Plaintiff, yet this agreement ought not to be specifically performed: first, upon the single ground of great inadequacy of consideration: secondly, this case contains

contains other circumstances, most material; which make it unfit for a Court of Equity to decree a performance. With reference to the first point, refusing the decree your Lordship will act in conformity to rules of equity, recognized by a great number of your predecessors, and a late decree by a very experienced Judge in Equity. The only authorities, that have been mentioned, are *White v. Damon*, and the case, mentioned by Lord Thurlow in *Mortimer v. Capper*. Subscribing entirely to the doctrine laid down by your Lordship in the former case, it contains nothing, that has relation to this. Your Lordship expressed yourself in a most guarded manner; confining your observations to the case of a sale by public auction. Certainly there is great reason to be surprised at Lord Rosslyn's decision: but his opinion, that even in that case a performance could be refused, marks strongly what he would have thought, if the sale had been by private contract. Sales by auction are of a very peculiar nature: a sort of contract with the public, that the article shall be sold for whatever is offered, however inadequate. Upon that ground it has been held at law, and that has * been followed in equity, that employing persons to bid on behalf of the vendor, with a view to enhance the price, is a fraud (94). There must be competition. The vendor takes the benefit of that; and contracts a sort of engagement of public faith, that he will let it go at whatever shall be offered. There must be some reciprocity. If the purchaser cannot enforce the contract, where the price is too little, neither ought the vendor, where it is too much.

It is impossible to proceed upon the authority of the case, mentioned in *Mortimer v. Capper*. A most important distinction upon the subject of contracts, that Courts of Equity have always made, between ordering a contract

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(94) See ante, *Conolly v. Parsons*, Vol. III, 625, n.

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to be rescinded and decreeing a specific performance, is disregarded. It has been long settled certainly, that inadequacy of consideration is not a ground for decreeing an agreement to be delivered up to be cancelled, except perhaps in the instance, put by Lord *Thurlow*, where it is so gross as to excite an exclamation (95). This distinction has been frequently forced upon the Court by a bill for the specific performance of an agreement, and a cross bill to have it delivered up to be cancelled; and the Court has refused to rescind the agreement, on the ground, that it was not obtained by fraud; and has also dismissed the other bill: *Savage v. Taylor* (96). It is stated every where, that the jurisdiction of equity upon specific performance is discretionary: not capricious, and unrestrained by any rules; but, adopting your Lordship's expression (97) in *White v. Damon*: "It must be regulated upon grounds, that will make it judicial." It is not to be admitted, that it is a discretion, to be exercised upon such certain and precise rules, that it can be known previously, what will be the decision. All your Lordship's predecessors have frequently stated, that a performance shall not be decreed of an unreasonable, unconscionable, or a hard, agreement. It is scarcely possible to find expressions, admitting greater latitude, or more vague: yet those expressions have been adopted, among other great Judges, by Lord *Hardwicke*, in *The City of London v. Nash* (98); who said, the most material objection for the Defendant was, that the Court is not obliged to decree a specific performance; and will not, where it would be a hardship. The Court refusing assistance, considers, that, the party is not without relief; though he cannot have that, which is considered as more effectual

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(95) Ante, Vol. VI, 273. *groom*, ante, Vol. VI, 328,  
*Underhill v. Horwood*, ante, Post, XVI, 83.  
 200. (97) Ante, Vol. VII, 35.  
 (96) *For*. 234. *The Marquis of Townshend v. Stan-*  
 (98) 1 *Ves.* 12.

effectual and better than damages. The ground, upon which this relief was originally granted, was, that it was conceived a more effectual remedy, as it is in given cases, than damages: but, applied to many different cases, it is a much more imperfect remedy; and from some late instances does not appear in so favourable a light; as the case (99) of a man, whose object was to be a freeholder of *Essex*, contracting for an estate, which, though situated on that side of the river, turned out to be in *Kent*. Other cases, familiar in the exercise of this jurisdiction, make the wisdom of carrying this relief to the extent, to which it has gone, very questionable. It frequently happens, that a purchaser will neither take the title, nor give up the contract; but insists, that the title shall be tried in a Court of Equity; and, if it proves good, he will take the estate: if bad, so much the worse for the vendor. This Plaintiff's object in this contract was plainly money only: not, to keep possession of this estate. Money therefore will answer his object better than a specific performance; the only effect of which, \* from the mode, in which he proceeds, will be to put a sum of money in his pocket. The Court also never will make a decree, the effect of which will prove the seeds of future suits; and the consequence of this decree must be, supposing Mrs. *Buller* was living, a suit against the trustees for a breach of trust; who might bring an action against the agent for damages on account of his negligence.

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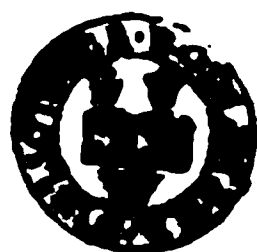
[ \*300 ]

One of the cases of inadequacy of value, is a late decision at the *Rolls*, by Lord *Alvanley*: *Day v. Newman* (100), upon the 11th and 12th of *December*, 1798, by original and cross bill. The original bill prayed the specific performance of an agreement for the sale of an estate, of the value, as represented on one hand of  
9 or

(1) See ante, Vol. VI, 678; and the note.

(100) Stated by Mr. *Romilly* from his own note.

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9 or 10,000*l.*; and, on the other, only 5000*l.* The contract was for 6000*l.* down, and 14,000*l.* at the death of a life, aged 65. Lord *Alvanley* said, it was not a case of actual fraud; but it was insisted, the bargain was grossly inadequate; and the [inadequacy was very great: it was impossible upon the whole evidence to make the estate to be worth more than 10,000*l.* though he would not decree the contract to be delivered up, he was satisfied, he ought not to decree a performance: the Court would decree neither the one nor the other: the only inconvenience of not delivering up the contract would be, that an action would lie for damages. Lord *Alvanley*, then advertng to *Nott v. Hill* (1), *Berny v. Pitt* (2), &c. desired to have it understood, he did not mean to disturb the cases, where advantage was taken of necessity; adding, that there was no such circumstance in that instance; and that upon the whole he was not warranted either to decree a specific performance, or to deliver up the contract; and therefore dismissed both bills.

In *Tilly v. Peers* (3) Lord Chief Baron *Eyre* expresses himself thus: "Laying out of our consideration all circumstances of fraud, the Court upon the mere consideration of its being so hard a bargain will not enforce it." Baron *Thomson* said, that, if there was no cross bill, and no circumstance of fraud, the Plaintiff would not have been entitled to relief: the consideration was not one-third of the value: but upon the cross bill it was a case of clear fraud. In *Kien v. Stukeley* (4) the decree must have been reversed upon the inadequacy and unreasonable terms of the bargain; for the circumstance, that the title was not made out by the day, certainly

(1) 1 *Vern.* 107.

(2) 2 *Vern.* 14.

(3) In the Court of Excho-

quer, 1791. Cited by Mr. *Romilly* from his own note.

(4) 2 *Bro. P. C.* 306.

tainly was not a ground for refusing a performance: *Squire v. Baker* (5), from the MSS. Table, taken from the Index of Lord *Harcourt*, is another authority, that an unreasonable agreement shall not be executed; but the party may make the most of it at Law. *Young v. Clerk* (6) supports the general doctrine, that this Court is not bound to decree a specific execution of articles, where they appear to be unreasonable; or where it would be unjust or unconscionable to assist them. In *Burton v. Lister* (7) Lord *Hardwicke's* words are extremely strong; declaring, that nothing is more established than that every agreement of this kind ought to be certain, fair, and just in all its parts: if any of those ingredients are wanting, the Court will not decree a specific performance: for it is in the discretion of the Court, whether they will decree a specific performance; as otherwise a *decree might be made, which would tend to the ruin of one party (8).

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It is not sufficient to say, these rules are vague and indefinite, if they have been acted upon. In a case, where there is a clear remedy at Law, where the only question is, whether Equity shall give that extraordinary assistance, which is not of very antient origin, there is no great inconvenience in deciding upon the particular circumstances; as this Court is obliged to do upon costs, and in many other cases, which must be left to an indefinite discretion; and there is no more difficulty in deciding upon the point of adequacy, than what is reasonable, or unreasonable; conscientious, or unconscientious; just, or unjust.


Then, with reference to the circumstances of this case: within two months after the agreement with the Plaintiff,

(5) 5 *Vin.* 549.

(7) 3 *Atk.* 383.

(6) *Pre. Ch.* 538.

(8) 3 *Atk.* 385, 386.

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Plaintiff, and, before he could be called upon to execute it, he has contracted to sell for nearly 35,000*l.* a part of the estate, for which he was to give only 26,500*l.* Certainly the second sale was under different circumstances; in lots; the payment by instalments; and part of the money to remain on mortgage. But the instalments were to be received in 1801, in *March, May, June, and September*; and, allowing for all the advantages, it is impossible to say, there was not great inadequacy. The purchasers were but seven in number. It was not therefore, as represented, retailing the estate to the tenants; and, if the advantage is to be attributed to a sale in lots, it must be recollected, that by the original plan of sale the estate was divided into fifteen lots. No evidence of surveyors is produced: but what can be more unsatisfactory? Can the *Pretium affectionis* be supposed to influence so many persons? Some circumstances, of a very important nature, appear upon this evidence. There is not the least doubt, that the auctioneer has conducted himself with a degree of negligence so gross, that an action would lie. When an agent has conducted himself in that manner, will a Court of Equity enforce the contract against the principal; compelling him to have recourse to that remedy; the purchaser also having a right to sue the agent, if not authorised to sell to him? Will the Court make such a decree, where the effect will be to give a great advantage to a third person, arising entirely from the gross negligence of an agent? A second valuation was made by this agent, amounting to above 6000*l.* more than the former. Of that he makes no communication: but with that information, acquired at the expence of the vendor, in his possession, he signs a contract at the former valuation.

Hitherto the case has been considered, as if Mr. *Buller* had been treating for an estate of his own. But it
 must

must also be considered with reference to the trust. The trustees ought to have consulted Mrs. *Buller*, and also to have considered, what was her interest upon the subject. The agent, apprized of the circumstances, takes upon himself to act, without guarding the contract with the approbation of the trustees; and thereby undertakes the duty of trustees, to take care that no contract shall be entered into, that is not advantageous to the trust. Would not the trustees, acting in this manner, have been considered guilty of a gross and flagrant breach of trust? Will the Court execute a contract obtained by a breach of trust? A Plaintiff, seeking this extraordinary relief, must make out a case, entitling him to it; and it is not enough, that he has a legal contract; and that his conduct has been such, that the Court will not interfere to deprive him of it. For this purpose his conduct must appear to have been fair, just, reasonable, and conscientious. In this particular branch of jurisdiction, it is necessary to have recourse to the *Arbitrium Boni Viri*; which has been erroneously supposed the general standard in this Court. These circumstances present an extreme case; and it is not necessary to have recourse to general doctrine. If the trustees had improvidently employed some person to contract for them, and before execution had discovered, that the value was 5000*l.* more, ought they not to have acquainted Mrs. *Buller* of that; and would she under that representation have consented to the sale; without which consent they had no authority to convey?

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But, upon the Statute of Frauds (9), there was no valid contract of the trustees by their authorized agent. The Plaintiff has not proved such authority; and the admissions of the answer do not supply the want of evidence. Lord *Hardwicke* states, that he, not only
never

(9) Stat. 29 Ch. II, c. 3.

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never authorised this agent, but did not know he was consulted, till long after this contract was entered into; and the representation of the other trustees is, that they never consented to any thing but Mr. *Buller's* desire, generally expressed, to sell: nothing in their admissions importing their consent to make this person their authorised agent, so as to bind them. The effect is nothing more than a communication of the desire of Mr. and Mrs. *Buller* to sell; and their answer, that, if the thing is advisable, they will not object. What other answer could they give? They could not object to the desire to sell: but their consent to that does not bind them to, or implicate them in, the terms of the sale.

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The Lord CHANCELLOR.

No specific performance, if any surprise, making it not fair and honest to call for it: the Plaintiff left to Law.

In this very important cause one or two cases may deserve consideration. In *Twining v. Morrice* (10) there was no pretence in the evidence of any contract by *Blake*, that he should bid for the vendors. Lord *Kenyon* said, this Court is not bound specifically to execute every contract; and if there was any sort of surprise, that made it not fair and honest to call for an execution, he would not give the extraordinary relief of a specific performance (11): neither would he order the contract to be delivered up: but would let the purchaser go to law. The only ground there was, that *Blake*, who purchased for *Twining*, having been the Solicitor for the vendors, Lord *Kenyon* was satisfied, his bidding had damped and chilled the sale; creating a suspicion, that he was a puffer; and though there was no evidence, that the estate would have brought more, he thought that circumstance a very sufficient ground for refusing a specific performance. There is another case, in which, I think,

Lord

(10) 2 Bro. C. C. 326.

& Walk. 74. *Martin v. Mil-*(11) *Bridger v. Rice*, 1 Jac.

chell, 2 Jac. & Walk. 413.

Lord *Alvanley* was right: *Emery v. Wase* (12). Upon the appeal, I adopted Lord *Alvanley's* opinion, that it is not incumbent upon this Court to decree a specific performance in a case, where such a circumstance as a careless valuation was likely to lead to harsh consequences, upon that singular doctrine of this Court, that a husband must go to gaol, if he cannot procure his wife to concur in the act, for which he had contracted. *The Marquis of Townshend v. Stangroom* (13) also contains something relative to this subject; and upon all the cases there is not the least pretence for saying, this Court must either execute the agreement, or order it to be delivered up; for the whole doctrine of the Court has gone upon the contrary of that. Lord *Thurlow* used to refer this doctrine of specific performance to this; that it is scarcely possible, that there may not be some small mistake or inaccuracy; as that a leasehold interest, represented to be for 21 years, may be for 20 years and nine months: some of those little circumstances, that would defeat an action at Law; and yet lie so clearly in compensation, that they ought not to prevent the execution of the contract (14). But that has been extended to a great length in this Court. The rule is clear enough: but the application in each particular case must depend upon the discretion of the Judge. It is like the case of fraud. The rule is, that this Court will set aside a bargain for fraud: but the Court has never ventured to lay down, as a general proposition, what shall constitute fraud.

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Small mistakes
or inaccuracies
in a contract
are the subject
of compensa-
tion: but that
has been ex-
tended to a
great length.

The

(12) Ante, Vol. V, 846; of *Vend. and Pur.* 123, 5th
VIII, 505. See the notes, edit.
V, 734, 849.

(13) Ante, Vol. VI, 328. (14) *Calcraft v. Roebuck*,
ante, Vol. I, 221. See the
Post, XIII, 135. *Hosier v.* note, 226.
Read, 9 Mod. 36. *Sugd. Law*
Vol. X. U

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The *Solicitor General*, in Reply.

The well known distinction between decrees to rescind and to enforce contracts does not apply to a case like this; which rests upon inadequacy alone. *White v. Damon* contained many other circumstances: the distress of the vendor, the time and place of sale, notice to the vendor, but no consent by him. The other authorities referred to are also inapplicable, amounting only to this; that a person, coming with an equitable title, must shew, that it has been fairly obtained; and the description of the contract, as hard, unreasonable, and unconscientious, is referred to the conduct of the person seeking relief. In *Day v. Newman* there must have been more than mere inadequacy of price; and the cases, referred to by Lord *Alvanley*, of an unconscientious bargain with an expectant heir, are upon a different principle. The case in the Court of Exchequer was upon an agreement as to stock; which does not stand upon the same ground as Land. The MSS. Table, attributed to Lord *Harcourt*, are not entitled to any credit (15). None of the circumstances, upon which the relief of specific performance has been denied, affect this Plaintiff. No misrepresentation, no oppression, can be imputed to him. This Defendant had all means and opportunity of information as to the value. In such a case there can be no reason for the exercise of that discretion, that must be resorted to upon subjects of an uncertain nature; as costs; which are necessarily so from the number of parties, and the variety of interests; which not being the subject of contract, do not admit an absolute rule, depending upon a known and fixed principle. In the cases of annuities the nature of the transaction, generally with distressed persons, induces the Court to investigate it with great strictness. *Emery v. Wase* was the case of married women; and had another peculiar circumstance, that the value was to be ascertained by an arbitrator;

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(15) *Ante*, Vol. II, 159; III, 627.

arbitrator; who was the agent for both parties. The principle, admitted by your Lordship upon the appeal, is sufficient for this case. As to the objection upon the Statute of Frauds, the case is put by the supplemental bill as the contract of Mr. *Buller*; and there is no doubt, that the agent was authorised by him. There was nothing to suggest to the Plaintiff, that the property was settled, until the objection made by the trustees to execute the conveyance. Mr. *Buller* having made this contract, cannot avail himself of arguments, that would have been competent to the trustees; that there was not sufficient authority; and that it would have been a breach of trust.


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*The Lord CHANCELLOR.*

This case is extremely important, not only to the parties, but also to the general interests of justice, as administered in this Court. There is nothing in the circumstances, that could induce me to think, the Plaintiff could be restrained from using all the remedies he might have at Law; if a bill had been filed to have the contract delivered up. It is much too late to discuss now, whether this Court ought to order a contract, that it would not specifically perform to be delivered up, and to decree the performance of a contract, which it would not order to be delivered up; for the distinction is always laid down, that there are many cases, in which the party has obtained a right to sue upon the contract at Law, and under such circumstances, that his conscience cannot be affected here, so as to deprive him of that remedy; and yet, on the other hand the Court, declaring, he ought to be at liberty to proceed at Law, will not actively interpose to aid him, and specifically perform the contract. *Twining v. Morrice*, and many other cases, are of that sort.

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It is necessary to advert very particularly to the circumstances of this case. In a trust of this nature, the

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most improvident course, that can be adopted, is to entrust the tenant for life with the execution of such a power as this; for it is generally the interest of the tenant for life to convert the estate absolutely into money, either with a view to sell another estate to his family, or for the ordinary purpose of getting a better income during his life. The mode of settlement therefore in such a case is, that the trustees are to sell; but not without calling to their aid all fair attention to the nature of the subject, and the convenience of the family. They are to sell therefore with the consent of the husband and wife; and, as she is a purchaser for her future family, the providence of the settlement farther requires, that the fact of her consent and approbation shall be evidenced by deed with two witnesses. With \* that consent and approbation, necessary to protect the interest of the tenant for life, the trustees, bound to a due attention to the interests of the children, have the power of selling for such price as shall appear to them to be reasonable. That expression must be construed, at least in a question between the trustees and the *Cestuis que Trust*, after they have with due diligence examined. The object of the sale must be to invest the money in the purchase of another estate, to be settled to the same uses; and they are not to be satisfied with probability upon that; but it ought to be with reference to an object, at that time supposed practicable: or, at least, this Court would expect some strong purpose of family prudence, justifying the conversion, if it is likely to continue money. The character of the parties to this transaction is quite unimpeached. All the trustees, meaning to act properly, make Mr. *Buller* their agent: but, the trustees being interposed to guard against what the tenant for life may propose, he ought not to have been agent for them. The conduct of the agent, to whom the trustees apply, through the medium of Mr. *Buller*, to sell by auction, unless he could sell advantageously by

by private contract, is most unaccountable: but certainly the Plaintiff is not concerned in that: the agent's advice, if an offer, from 24,000*l.* to 27,000*l.*, should be made, to have a consultation; also recommending a survey in the mean time: a declaration therefore, that it would not be a provident act to carry the estate to sale without farther examination of its value. But it does not rest there. He might afterwards have thought, the value had been satisfactorily ascertained; and that the trouble and expence of a farther survey was unnecessary. But that is not so. In the course of six days transactions take place, perfectly without example even in these cases; where difficulties have been raised by the conduct of auctioneers. A valuation was actually \* made between the 6th and 9th of *September*; and that valuation raised the property up to 33,386*l.* Was it not a most important part of the duty of that agent to submit that fact to the vendors, resting upon the sanctioned opinion of the very agent, to whose discretion and judgment they resorted, to direct the terms of the sale; instead of letting them judge upon the speculations of another person, what more might be obtained? But it does not rest there. Of the fact of the valuation no communication was made until *January* or *February* following.

There is evidence of inquiries by the Plaintiff as to the value, from the tenants, and all sources of information. He was at full liberty to do so; and having by all just means informed himself, that he could make a lucrative bargain, might honestly contract with persons at arm's length, and dealing for themselves. But, on the other hand, he is in the situation of a man, contenting himself with a contract, instead of a conveyance; and it is to be considered, whether he may have under the circumstances, not only relief at law, but the farther relief, afforded in this Court by a specific performance.

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The authority of the agent may be by parol, though the agreement must be in writing.

ance. It is clear, a Plaintiff, suing at Law for damages, or in Equity for a specific performance, must allege a contract, binding some one; and where a man is imprudent enough to deal with an agent for a third person, without taking care to see, that there is a written authority for sale, however great the hardship, the answer to his demand, both in law and equity, is, that he has dealt with a person, not legally authorised. The first consideration is, whether this was a contract for the trustees upon any thing antecedent to the date of it: 2dly, has it become their contract in this Court, connecting that with what passed subsequent to the date: 3dly, if it is the contract of the trustees, in either view, is it possible for this Court to execute it? Upon the first point, in order to make it the contract of the trustees, the Plaintiff must prove, that they did by parol authorize the agent, without farther consultation with them, to sell this estate in this manner, and at this price. Admitting that, if they left the price entirely to his discretion, in a question between them and the purchaser they have given authority, I must find that authority given specifically by all the trustees, or some one empowered expressly and clearly to pledge their authority. If I were to hold it given in this case, I should carry these circumstances to an extent, that would make the doctrine, that the authority may be by parol (16), though the agreement must be by writing, the most mischievous evasion of the Statute. This is only a declaration of the trustees, that they are ready to concur in Mr. *Buller's* primary object, a sale; provided the estate should be duly and reasonably sold. It is in no way possible to say, there was a parol authority, in the sense required by the cases, to enter into this written agreement.

Next,

(16) Ante, Vol. IX, 250, and the note. Post, XVIII, 509.

Next, are they bound by their subsequent conduct; as if there had been antecedent authority. Clearly they are not. The trustees never had the approbation of the husband and wife. They never can be said to be bound by the drafts settled by the solicitor; and in the very nature of the subject of sale there was a circumstance, giving them *Locus Pœnitentiæ*, the moment they were informed there was a question, whether the price was reasonable. But, supposing them bound, that will not help the Plaintiff to the relief prayed; for I am clearly of opinion, their conduct was a breach of trust; not meaning to throw any imputation upon them; as the transaction was very likely to happen: but their duty was not to execute their power of selling, unless they knew, a discretion had been wisely and fully exerted \* upon the point of reasonable price; unless they were satisfied, that upon that point no reasonable objection could be made with reference to the interests of Mr. *Buller*, Mrs. *Buller*, or the children, who might come into existence. If the Court had been called upon in the life of Mrs. *Buller* for a specific execution, there is so little ground for it under these circumstances, that on the contrary at the suit of the *Cestuis que Trust* the trustees would have been restrained from executing. The question as to the interposition of the Court between the Plaintiff and Mr. *Buller* would have been different. But it would be impossible to decree a specific performance, when in the very same day the Court might be compelled to say, it would be a breach of trust.

Next, this case may, I think, be determined upon the circumstances, without going very accurately into the doctrine as to inadequacy of value. I have looked into several of the cases upon that point; though I do not mean to decide upon it. Cases also may arise, in which circumstances, having a different effect, and different in their nature from inadequacy, will require great consideration,

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deration, upon the question of specific performance. Lord *Rosslyn*, who had certainly great experience in this Court, in *White v. Damon*, if he did not put the decision upon the inadequacy of the contract, still thought, there were other circumstances, in no manner connected with the conduct of the vendee, which this Court ought to attend to upon the subject of specific performance; and observed, that the estate, situated at *Gosport*, was sold at *Garraway's*; at a time too, which of itself might form an objection, deserving serious consideration, if the place had been proper. I do not go far into the discussion of the questions, the principles of that case, so put, may furnish. But, taking Lord *Rosslyn* to have been duly of opinion, that, if an auctioneer, called upon in that capacity to sell, so grossly forgot what was due to his employer, by selling at a very improper time and place, that by reason of that negligence the property sold for half its value, this Court ought not to decree a specific performance; so, on the other hand, you must consider in every case, constituted of circumstances, furnishing similar objections, how much is due to them; and upon the circumstances of this very case, supposing the Plaintiff could have a decree, it must be considered, whether a man is not bound by the contract of the auctioneer, made without even advertising the property. The negligence may be more or less gross. Upon the principles, that have been ably pressed for the Plaintiff, if a person is to have a specific performance under such negligence as this, where is it to stop? Upon that ground simply I should hesitate long, either with reference to the trustees, or Mr. *Buller* himself, before I should state, as a clear proposition, that, where the title to a specific performance is founded in a gross breach of trust by an agent to his principal, a Court of Equity would assist the Plaintiff in the purpose of availing himself of that breach of trust; and whether the principle would not authorise the Court to leave him

him to Law, and not to let him come here for a remedy beyond that. There are *dicta* enough well to authorise that.

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The case of *Twining v. Morrice*, before a Judge, who understood the doctrine of Courts of Equity as well as any one, is an authority, that much less would do. There is no comparison between the circumstances of that case and this. That case was free from all imputation upon the party. It was no more than that the vendors had employed *Blake* as their Solicitor. When the estate had been brought to sale, he was in no sense their agent. They had never suggested to him, nor • had he undertaken, to bid for them. The Plaintiff, going into the room, bid *Blake*, as a friend and neighbour bid for him. Lord *Kenyon* said, as his bidding might appear to the persons present a bidding for the vendors, and as that might damp the sale, that formed such an impediment to a specific performance, that the party should be left to Law. I give no opinion upon that case: but it is infinitely short of this, which goes this length; that the vendor has by the silence of the agent with regard to the last survey lost all opportunity of dealing with the knowledge of that survey by the agent himself, and of the fact, excessively material, that the estate, if sold in lots, might probably produce so much more. The vendor is in all probability full as much prejudiced, as the vendors in *Twining v. Morrice* were by the accidents attending that sale. My opinion therefore is, 1st, that this was a sale, in which the trustees had not given lawful authority enough to contract on their behalf within the Statute; and therefore are not bound: 2dly, supposing, they had given sufficient authority, still, considering the nature of their interest, this Court could not have compelled an execution against the *Cestui que trust*, if they had been living; not stating
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my opinion as to any remedy the Plaintiff might in that case have against the trustees for damages.

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Contract by trustees under a Power of sale, though by subsequent events it cannot be executed under the Power, shall be made good in equity by the effect of the interest acquired in the estate, bound by the contract.

Next, if this contract cannot be executed against the trustees, can it against Mr. *Buller*? First, what decree would have been made, if this cause had been heard, not under these circumstances, but, while Mrs. *Buller* was living, or any children, if she had any? The supplemental bill does not vary the statement of the original bill as to the nature of the contract. It might have been put as the contract both of the trustees and of Mr. *Buller*: but the supplemental bill was necessary, supposing the contract originally to have been with the trustees only; for it might happen, that, after the trustees in such a case had entered into a due contract, binding all parties, circumstances might arise, that might prevent them from carrying it into execution; and that is the very point contended by this supplemental bill; stating truly, that they had only an estate to preserve contingent remainders during the existence of the marriage; and in the event, that has happened, Mr. *Buller*'s estate for life, and his remainder in fee being brought together, in law the power of the trustees is in the language of the supplemental bill extinguished and gone. But, though the power is gone at Law, yet, if the purchaser had entered into the contract with the trustees, with the approbation of Mr. and Mrs. *Buller*, according to the deed, that contract, once entered into, and having bound the estate, though it could not be executed by the power of sale, should be made good by those, who had got an interest, by the effect of their interest, if not by the authority of the trustees; and that is the meaning of this bill.

I agree, if a person carries an estate to market, not having any title at the time, it is much too late to discuss

ness the question, whether it would have been whole-
some originally to have held, that he should not have
a specific performance (17). There is a difference be-
tween an estate subject to incumbrances, and the case
I put; where the vendor at the date of the contract
has not a title. Some authorities go the length of
giving a specific performance, if the vendor can even
by an Act of Parliament obtain a title before the report.
I also agree, if a man, having partial interests in an
estate, chooses to enter into a contract, representing it,
and agreeing to sell it, as his own, it is not competent to
him afterwards to say, though he has valuable interests,
he has not the entirety; and therefore the purchaser
shall not have the benefit of his contract. For the pur-
pose of this jurisdiction, the person contracting under
those circumstances, is bound by the assertion in his
contract; and, if the vendee chooses to take as much as
he can have, he has a right to that, and to an abate-
ment; and the Court will not hear the objection by the
vendor, that the purchaser cannot have the whole (18).
But that always turns upon this; that it is, and is in-
tended to be, the contract of the vendor. My opinion
is, that this was not the contract of Mr. *Buller*; that it
was not in the contemplation of the agent, the trustees,
or any one, excluding the Plaintiff, that it should be the
contract of Mr. *Buller*, if it was not the contract of the
trustees.

If I am wrong in this, that brings it to the effect of
the agent's conduct. The objection is taken, how does
that concern the Plaintiff? Whether as between them it
was his contract, or not, the Plaintiff conceived it to be
so. I do not enter into the question of fact; for the
answer to the Plaintiff is just as effectual, whether he
conceived

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having a title
at the date of
the contract,
shall have a
specific per-
formance, if
he procures a
title
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Vendor, re-
presenting and
contracting to
sell the estate
as his own,
cannot object,
that he has
only a partial
interest. The
purchaser is
entitled to as
much as he
can have, and
an abatement.

(17) *Ante*, *Jenkins v. Hiles*, Vol. VI, 646, and the note, 655.

(18) 1 *Swanst.* 54.

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conceived Mr. *Buller* to be dealing for his own estate, or not. The Plaintiff has no contract, but a contract, signed by this agent; and upon his evidence the trustees were his principals; and it was not the intention of Mr. *Buller* to give any authority, binding himself, that did not bind the trustees. It was for the sale of their inheritance, not his; including minor interests, if not affecting their's. It is impossible therefore to say, it was the double contract: that of the trustees; and, if not their's, his; and it was not his intention to part with his partial interest. His intention was to give, not his authority, but that of the trustees, to the agent; and, if their authority was not effectually given, *whatever may be the remedy at law, it cannot be executed partially in equity; and it would be strange, if that contract, which never could have been executed, unless it was the contract of the trustees, for the substitution of other lands, to be settled to the same uses, should have been executed in this Court by tearing to pieces the family property, that was the subject of the contract.

The result is, that nothing was intended to be bound but the inheritance of the trustees; that the trustees have not given such an authority as binds them within the Statute; that, if they had, the execution of this contract would under the circumstances have been such a breach of trust, that this Court would not have permitted them to carry it into execution; farther, that under the circumstances, if the Plaintiff cannot have a decree for the whole, he cannot for a part; and the subsequent event makes no alteration; for the contract of the trustees, not of Mr. *Buller*, must have been the foundation of the decree; and, if so, it cannot become his contract by the event of the death of Mr. *Buller* without children. These are the grounds, upon which this case may be determined; without saying more upon the

the inadequacy, or the retention of that important fact by the agent; though that alone is a sufficient ground for a decree, dismissing this bill.

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The decree, drawn up by the *Lord Chancellor* himself, declared, that it appears to this Court, that at the time the alleged contract, the specific performance of which is sought in this cause, was made, the power of selling the whole inheritance of the estates in question was by the marriage settlement reserved to trustees therein named, to be executed by them for the purposes therein prescribed, at such price as should appear to them to be reasonable, and with such approbation and consent, and so testified, as therein-mentioned; and that the said trustees are not bound in the event, which has happened, of the death of the late Defendant *Elisabeth Buller*, without leaving any issue of the marriage now living, and would not have been bound under the circumstances proved in this cause, if such event had not happened, by the said alleged contract to have executed such power for the purpose of specifically executing such alleged contract; and, it having been contended, that *Elisabeth*, the wife of the Defendant *John Buller*, having died without issue, and that by reason of such event the said Defendant *John Buller* having since the filing of the original bill acquired such an interest in the estate as would enable him by his own act to convey the inheritance in fee-simple, to the purchaser, he ought to be decreed to make such conveyance, it was farther declared, that, due and equitable regard being had to the proofs in this cause respecting the value of the premises, alleged to have been contracted to be sold for the sum of 26,500*l.*, and to the fact, that the same had been re-surveyed and re-valued on behalf of the proposed vendors and estimated upon such re-survey and re-valuation as worth the sum of 33,386*l.* to be sold in lots, and

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and that such re-valuation had not been disclosed, before the alleged contract was signed, to the intended vendors, or any person interested in the money to arise by sale of the premises, although made under the directions of the persons signing the said alleged contract, as authorised so to do on behalf of the vendors, and to all other the circumstances of this case, this Court ought not, if the said *Elisabeth Buller*, or any issue by her, were now living, to direct, that the said contract, which appears to this Court to have been intended to be a contract on behalf of the said trustees, acting in exercise of their power under the said settlement, for sale of the whole * inheritance of the premises settled, should be carried into execution by the said Defendant *John Buller* only, as far as his partial or particular interests in the said settled premises would have enabled him in such case to execute the same; and it was farther declared, that, such due and equitable regard being had, as aforesaid, this Court ought not, although the event has happened of the death of the said late Defendant *Elisabeth Buller* without issue of the marriage, to decree him, the said Defendant *John Buller*, to convey the enlarged estate, which by reason of such event he is enabled to convey, to the Plaintiff in the specific performance of the said alleged contract; but that in this case the Plaintiff ought to be left to his remedy at law; and therefore without prejudice to such remedy the original and supplemental bills are dismissed without costs.

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Oct: 31st.

Dec. 15th,

17th.

THE Master's Report, under the usual decree, upon a bill by creditors on behalf of themselves and others, stated the following instruments and circumstances:

Appointment by Will among children under a Power to the father.

By articles, dated the 2d of *August*, 1760, previous to the marriage of Sir *Joseph Mawbey* and *Elizabeth Pratt*, in consideration of the marriage and of 12,000*l.*, the marriage portion of *Elizabeth Pratt*, and to the intent, that the same after the decease of Sir *Joseph Mawbey* might remain and be as a provision for *Elizabeth Pratt* and the children of the marriage in manner thereafter appointed, Sir *Joseph Mawbey* agreed, that he would at the time of receiving the said 12,000*l.* execute a bond in the penalty of 24,000*l.* with a condition for his heirs, executors, &c. within six months after his decease, to pay the sum of 12,000*l.* to trustees; upon trust to invest the same upon Government or real securities; and to permit *Elizabeth Pratt* to receive the interest and produce for her life; and after her decease to pay and distribute the said 12,000*l.* to and amongst all and every the children, if more than one, at such time and in such shares and proportions as Sir *Joseph Mawbey* and *Elizabeth*, his wife, by any deed or deeds or other writing, to be jointly executed in the presence of two or more witnesses, should appoint; and for want of such appointment, then upon trust to distribute the said 12,000*l.* to and amongst all and every the children of the said marriage, if more than one, in equal shares and proportions at the respective times following: that is to say, to such of them as should be sons at the age of twenty-one years; and to such as should be daughters at twenty-one or marriage; and in the mean time and until their respective shares should become due and payable,

A share, lapsed by the death of one in his life, goes among all, as in default of appointment;

[•\$20] notwithstanding a direction, that each, receiving a share, should release the fund.

No presumption of satisfaction or purchase from another provision, being expressly in satisfaction of a different interest.

to

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to apply the yearly interest to the use of such children equally and proportionably for the education and maintenance of such children respectively; and if there should be only one such child, then the whole 12,000*l.* to be paid to such only child, at twenty-one, or marriage if a daughter; and the interest of the said 12,000*l.* or a sufficient part thereof, till the principal should become due and payable, to the use of such only child; and in case there should not be any children, or all should die under the age of twenty-one, or marriage of a daughter, in the life of Sir *Joseph Mawbey*, and his wife, or the survivor, it was provided, that the whole sum of 12,000*l.* in the event of his surviving should be paid to his executors and administrators.

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The bond was executed accordingly; and a collateral security made upon estates of Sir *Joseph Mawbey*.

The issue of the marriage was seven children; four of whom survived their mother; who died in the life of Sir *Joseph Mawbey*. No appointment was made in her life. After her decease, and, while those four children were living, viz. *Joseph*, *Catharine*, *Mary*, and *Emily*, Sir *Joseph Mawbey* by his Will, dated the 11th of *October*, 1792, reciting the power of appointment in his marriage articles, and stating, that 12,000*l.* was then in his hands, secured by the estates mentioned in his marriage settlement and by his bond, and that no joint disposition by him and his wife had been made, for making a provision by way of portion for his daughters *Mary* and *Emily Mawbey*, who, he stated, as well as his eldest daughter *Catharine Goleburn*, would be entitled to particular sums of money upon the decease of persons therein named, did direct, limit, and appoint, give, bequeath, and dispose of, the said sum of 12,000*l.* in the manner and proportions following: first, he gave and bequeathed unto his second and to his youngest daughters

tets *Mary* and *Emily* 5000*l.* a-piece, (part of the said sum of 12,000*l.*) at their respective ages of 21 years or day or days of marriage, provided such marriage should have been with the consent of his executors, (which should first happen;) and he also gave and bequeathed unto his son *Joseph* at his age of 21 years 1900*l.*, further part of the said 12,000*l.*; and he also gave and bequeathed to his said daughter *Catharine Goleborn* the sum of 100*l.*, the remainder of the said 12,000*l.*; and he also gave, devised, and bequeathed, to his nephew *Joseph Alcock*, his heirs and assigns, during the life of *Catharine Goleborn* one annuity or yearly rent-charge of 200*l.* payable out of all his lands in the counties of *Surrey* and *Middlesex*, upon trust to pay the same quarterly into her own hands for her sole and separate disposal.

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The testator then, after giving some other annuities and disposing of his real estates, subject to a term of 500 years, in trust to raise portions, and to pay his debts and legacies, declared, that the said several money legacies, given in favour of his said son and daughters, as aforesaid, part of the said 12,000*l.*, were so given upon condition, that every one of them, his said children, upon receipt of his or her legacy should as to his son by himself, and as to such of his said daughters as should be unmarried by herself, and, if married, by herself and her husband, assign and release all his or her share of and in the said 12,000*l.* by virtue of the settlement or otherwise howsoever unto his said executors as part of his, the testator's, general personal estate; and he declared his Will, that such part of his personal estate should be applied for the maintenance and education of his two daughters *Mary* and *Emily* during their respective minorities as his trustees should think sufficient, not exceeding 120*l.* for each; and he gave the residue of his personal estate to his son.



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The Report farther stated, that shortly previous to the Will the testator's daughter *Catharine* married *Thomas Lynch Goleborn* without her father's consent; and, when he made his Will, he continued adverse to such marriage; which, it was presumed, was the reason for giving her 100*l.* only of the 12,000*l.*; but in addition he gave her the annuity of 200*l.*, payable out of his own property; that soon afterwards a reconciliation took place; and the testator agreed to give his said daughter 5000*l.* in lieu of the annuity; and accordingly on the 11th of *December*, 1792, executed a bond to trustees payable at 4*per cent.* in six months after that date; and by indenture, dated the same day, he settled this 5000*l.* for the benefit of his daughter *Catharine Goleborn* and her husband; and after the death of the survivor for the benefit of their children, as they should appoint; and, for want of such appointment, equally; and, in default of issue *Catharine Goleborn* to be at liberty to dispose of 2000*l.*, part of the said 5000*l.*; and as to the residue thereof in trust for her next of kin; and he made the same a charge upon estates, not subject to the 12,000*l.* Her husband by the same deed settled estates in *Jamaica* for securing a jointure and portions.

The Report also stated, that the testator immediately afterwards, viz. the 14th of *December*, 1792, by a codicil, reciting the disposition by his Will of the annuity of 200*l.* for the separate use of *Catharine Goleborn*, and, that since the execution of his Will he had by the said indenture, dated the 11th of *December*, 1792, settled a competent provision for his said daughter, did therefore revoke and make void the aforesaid bequest to *Joseph Alcock* of the said annuity of 200*l.*; and did ratify and confirm his said Will, thereby altered and revoked; and by another codicil, dated the 2d of *May*, 1795, appointing his son sole executor, he confirmed in all particulars his said Will and former codicils.

The

The testator died in 1798; leaving his son and his two daughters *Catharine* and *Mary* surviving: his youngest daughter *Emily* having died in his life on the 30th of *December*, 1797, unmarried, at the age of eighteen. Her father was her administrator, with a testamentary paper annexed. *Mary* married *Thomas Charles May*; and, having attained twenty-one, died without issue. Her portion under the marriage settlement and Will of her father was settled, in the event of her death in the life of her husband, without leaving issue, for her, her \*executors or administrators. Her husband, as her administrator, claimed before the Master the sum of 6666*l.* 13*s.* 4*d.* viz. 5000*l.* as her appointed share of the 12,000*l.*; and 1666*l.* 13*s.* 4*d.* as her share of the part of that sum, left unappointed; the Defendants *May* and *Goleborn* and his wife contending, that the testator's execution of the power by his Will was a good appointment of the 12,000*l.*; and that the death of his daughter *Emily*, before such appointment could operate in her favour, only discharged her share from the appointment: and her share, being unappointed at the death of the testator, ought to be divided according to the directions of the settlement in default of appointment: viz. among the three surviving children.


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The Master having allowed the claims of the Defendants *May* and *Goleborn*, exceptions to the Report were taken by Sir *Joseph Mawbey*.

The *Attorney General*, Mr. *Piggott*, and Mr. *W. Agar*, in support of the Exceptions.

This Will and the codicil must be considered one instrument; and the Will must be brought down to the date of the codicil. The children cannot claim more than 12,000*l.*; and, all claiming under the appointment, must give the benefit of the release, for which the father stipulates by his Will in favour of his son,

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the residuary legatee. The 5000*l.* settled upon Mrs. *Goleborn*, must be a satisfaction. Slight circumstances of difference will not enable a child, a creditor under these circumstances, to have a double portion. The principle is, that the parent, making a provision for the child by settlement, by way of portion, discharges the debt *in toto*, if the provision is equal; if less, *pro tanto*; the presumption being in favour of satisfaction, and \*against the double portion; and the proof thrown, especially since the case of *Hinchcliffe v. Hinchcliffe* (19), upon the child. The condition imposed by the testator must have been intended to guard against lapse. By the whole of this disposition he is to be considered as doing for these children all he intended to do for them. Going beyond his debt, and burthening his estate to the extent of 17,000*l.*, it cannot be contended, that in the event, that has happened, his estate is still to be burthened with that sum; unless that intention is clearly shewn: the presumption being the other way.

Mr. *Richards* and Mr. *Romilly*, for the Report.

The settlement of the 5000*l.* upon Mrs. *Goleborn* and her family is not attempted to be in pursuance of the power; which clearly was not in contemplation. The provision was substituted for the annuity, beyond the object of the power; discovering a clear intention to give more than the 12,000*l.* The supposed intention to purchase the share of any child, who might die, all being then living, would be singular; and there is nothing, intimating such a purpose. He could not purchase the share of any of his children, who might die in his life. When executing this instrument he clearly meant to charge 17,000*l.*; and there was no intention to diminish that, if any of the children should die. The doctrine of double portion and satisfaction does not arise in this case.

*The*

(19) Ante, Vol. III, 516; see the notes, I, 112, 259.


*The Lord* CHANCELLOR.

This case is clear of all doubt. The effect of the settlement upon the marriage of Sir *Joseph Mawbey* is, that the children before the age of twenty-one or marriage \* would be entitled to maintenance by express provision; and as to the principal sum of 12,000*l.*, if there should be no appointment, the children attaining the age of twenty-one, or, in the case of daughters marrying, would take it among them. It is clear also, that according to this declaration of trust, if there was but one child, who attained twenty-one, or married, that child would have taken the whole; for the disposition over is only, in case there shall not be any children, or all shall die under age or before the marriage of daughters. This interest, which would be in them by title, is given, not by the Will of their father, but by the settlement, upon their attaining the age of twenty-one or marriage. All he could do by his Will was to vary the nature of the title, vested in them independent of any appointment. It was competent to him therefore to fix the times and proportions; provided he gave a proportion to every one. By his Will, in exercise of his power, and not as matter of bounty, he gives 12,000*l.* Upon that Will it is clear, if any of the objects had died in the life of the testator, not having taken by the appointment, so much as by the event of that death remained unappointed, would have been disposed of according to the settlement. If he had died soon after the execution of the Will, the executor could not have made the objection, upon the direction, that the children, receiving these sums, should give a discharge; for the answer by the surviving children would have been, that the effect of that would be an appointment to himself of the 5000*l.* appointed to the deceased child; which he could not do. The consequence is, that clause in the Will cannot have the effect contended; unless it can, connected with other circumstances. It is clear, by the annuity given to *Mrs. Golborne*,

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*born*, who married without his consent, the testator intended to give his children more than he was bound to give them. He afterwards relents; and settles 5000*l.* upon her and her family. Though, where a father has advanced to a child a portion upon marriage, it may be supposed, he intended to pay a debt, or satisfy a portion, I always understood, that presumption was not warranted, where the father has said, what he means to do; and in one case, the name of which I do not recollect, Lord *Thurlow* decided upon that ground alone, that he meant to satisfy something else. Then, bringing the Will and the settlement upon Mrs. *Goleborn* together, which is the fair way of putting it, it was competent to the father to do this, beyond the exercise of his power. The question is, Whether it was not his pleasure to do so at the time of the settlement; as it was at the date of his Will. He settles 5000*l.* taking notice, by a codicil, immediately afterwards, that he had made a Will; and, that he had given her an annuity of 200*l.*; and he revokes the annuity; intimating his purpose of giving her the 5000*l.* instead of the annuity; but expressly, not leaving it to inference, confirming the Will in all other respects: that Will purporting to dispose of the whole sum 12,000*l.* It is clear then, he intended, that 17,000*l.* should be paid in some events. The question is, whether he has determined the events, in which it shall, and shall not, be paid. The settlement is not a satisfaction of the portion of the 12,000*l.*, which he meant Mrs. *Goleborn* to take; for his Will, operating as an execution of his power, would give her only the 100*l.*, which he has not revoked. It cannot therefore be a purchase of her portion; for still he meant that to remain payable. Next, is it a purchase of the 5000*l.* out of the 12,000*l.*: or is it intended to be so in any future event? He has expressly negatived that. There is no case, where, when it appeared by the Will, that the testator was dealing upon

upon the settlement, giving the power of appointment, and the property would go according to the appointment, it was ever held, that, if one of the objects died, the proportion of that one should go otherwise, than if no appointment had been made. This testator meant by his Will both to execute his power and to give a bounty; and by his deed to substitute bounty for bounty, and nothing else; declaring thereby, that he did not mean to satisfy or purchase this portion; and, meaning neither, he has given a part of the sum he had the power of appointing to a person, who did not live to take it; and that must therefore be taken, as if no appointment of it had been made. If he had been asked, whether, if *Emily* should die, he intended, that 5000*l.* should go among the other children, he would in all probability have said, it should not. But that is not the effect of all these instruments, taken together. My opinion therefore is, that the Master's Report is right.

1804.  
BURGES  
v.  
MAWBEY.  
[ \* 328 ]

DUMBELL, *Ex parte*.

THE Petitioner, a bankrupt, was committed for contempt in not having obeyed an Order of the Lord Chancellor to bring into the Master's Office the title-deeds of an estate, sold under the Commission. The sale was upon the petition of the bankrupt set aside, as having been unduly made; and the bankrupt was ordered to be discharged from that commitment: but, detainers having been lodged against him, he petitioned also to be discharged from those detainers.

Mr. Leach, for the Plaintiffs at law, objected, that the Defendant had pleaded, and a Replication had been filed.

1804.  
Dec. 17th,  
20th, 21st.  
Discharge  
from a Com-  
mitment for a  
supposed con-  
tempt in Bank-  
ruptcy; which  
failed with the  
proceeding, on  
which it was  
founded.  
Subsequent  
detainers  
stand; accord-  
ing to the  
practice at  
law.  
Mr.

1804.  
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 DUMBELL,
Ex parte.

Mr. *Romilly*, in support of the Petition, proposed to file common bail, or to withdraw the plea.

The Lord CHANCELLOR.

The commitment being a process to carry into effect the sale of an estate, which sale according to my opinion cannot stand, the commitment, founded upon that sale must fall with it. With respect to the detainers, this is quite a new case. There is nothing like it in the Reports of this Court or the Courts of Law.

The Lord CHANCELLOR.

Dec. 21st.

I have not seen the *Chief Justice*: but Mr. Justice *Lawrence* and Mr. Justice *Chambre* are decidedly of opinion,* that in such a case neither the Court of *King's Bench* nor the Court of *Common Pleas* would discharge the Defendant from the subsequent detainers. No actual instances in such a case precisely are to be found: but Mr. Justice *Lawrence* mentioned an instance of a man, whose person was taken in execution upon a judgment; which turned out to be erroneous; and was reversed; it was held, he was entitled to be discharged from that execution: but the Court was clearly of opinion, that according to their practice all intermediate detainers would stand; and where the commitment was upon an interlocutory order, they agreed also, that, if the party did not make immediate application, but waited, till other detainers were lodged, and took steps upon those detainers, even in that case they would not discharge him from those detainers (20).

Upon the proposal of the petitioner's Counsel he was ordered to be discharged upon special bail.

(20) See ante, *Ex parte King*, Vol. VII, 312.

BOURKE v. RICKETTS.

ROLLS.

1804.

Nov. 22d.

Dec. 22d.

GEORGE ROBERT GORDON, possessed of considerable property in *Jamaica*, and in this country, and elsewhere, by his Will, dated the 14th of *February*, 1799, desired, that his debts, funeral expences, and legacies, should be first paid; and made subject and liable his estate real and personal, whatsoever and where-soever, and of what nature or kind soever, except certain parts, specifically disposed of. Then, after some pecuniary legacies, the testator bequeathed to each of the sons of his daughter *Mary Bourke*, who were or might be living at the time of his decease, (except the son named as one of his residuary legatees) the sum of 3000*l.* current money of *Jamaica*; and he gave to each of his grand-daughters the Plaintiffs (naming them) 1400*l.* current money of *Jamaica*; and he also bequeathed to all and every other the children of his said daughter, who then were or might be born, and living at the time of his decease, 1400*l.* current money of *Jamaica*, unto each of them; which aforesaid sums he thereby directed to be paid unto all of them, or their order, or legal appointment, his aforesaid grand-children, as soon as the aforesaid different sums should be raised and paid out of his estate, made subject and liable to the paying all his debts, &c. He gave other legacies; and disposed of the residue of his real and personal estate.

Legacies in the currency of *Jamaica*; where the testator resided: Assets and Executors in both countries.

The Legatees, living in this country, not entitled to *Jamaica* interest.

The testator died on the 24th of *December*, 1799. Four of his executors proved the Will in *Jamaica*; and it was also proved in this country by the fifth executor, residing here. The assets in each country were ample.

By

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By the Decree, pronounced by the *Master of the Rolls* upon the bill of the grand-children, the usual directions were given for taking the accounts, &c. ; and, that the Master should compute interest upon the legacies from the end of one year from the death of the testator after the rate of 4 *per cent. per annum*, unless any other time of payment or rate of interest was appointed by the Will, &c.

The Plaintiffs presented a petition of re-hearing; on the ground, that they were entitled to interest at the rate of 6*l. per cent.*; being the legal rate of interest in *Jamaica*, where the testator died.

Mr. *Alexander* and Mr. *Greenhill*, in support of the Petition.

These legatees are entitled to have their legacies paid with 6 *per cent.*: the legal interest, allowed by the Courts of *Jamaica*. The legacies are given in current money of *Jamaica*; where the testator resided, and was domiciled, and had his principal effects; though that circumstance is immaterial. Foreign interest has been frequently decreed in this country; though with some variety of opinion upon the subject. In the last case, *Raymond v. Brodbelt* (21), upon a legacy, directed to be paid in *Jamaica* currency, the *Lord Chancellor* directed interest accordingly, as to what was not invested at the testator's death, at 6 *per cent.* That was in the situation of every other general legacy. The direction to remit to *England*, which does not occur in this Will, makes no difference. This testator has no particular view to payment in *England*. If he had, he would have given the legacies in sterling money. If it is compared to the case of contract, it may be supposed, he had a view to  
 payment

payment in *Jamaica*. From accidental circumstances the suit is brought in this country, as it was in *Raymond v. Brodbelt*. In *Saunders v. Drake* (22) Lord Hardwicke gave interest according to the rate in *Jamaica*. So *Indian* interest was given in *Holme v. Allwright*, noticed by Lord Alvanley in *Malcolm v. Martin* (22).

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Bourke  
v.  
Ricketts.

Mr. Steele, for the Defendant.

These legatees are in *England*. One of the executors is in *England*; and there are large funds in both countries. If they choose to sue in *England*, why are they to be paid in a different manner from other legatees in this country.

*The MASTER of the ROLLS.*

The case before Lord Rosslyn turns upon the remittance. They were specially directed to make the investment in discharge of the legacies: but till then the Lord Chancellor thought, they were using the money in *Jamaica*, and were to pay *Jamaica* interest. I do not think, that case meant to determine, that the mere bequest of a legacy in a foreign country gives it with the rate of interest of that country. This case comes to that; for there is no circumstance of intention. If they had filed their bill in *Jamaica*, they would have had it: but upon the statement of the bill, there is an ample fund in *England*, and they choose to be paid here, and out of the fund in *England*. Then they cannot have *Indian* interest without a ground laid for it, either in the intention of the testator, or the situation of the fund. All the reasoning in *Raymond v. Brodbelt* would be superfluous, if the Lord Chancellor meant to lay down the general rule. Lord Alvanley was not of opinion, that a bequest

(22) 2 Atk. 465. See Mr. Sanders's note.

(23) 3 Bro. C. C. 50.

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bequest of a legacy in the currency of a foreign country should be with the interest of that country. There have been many cases upon *Indian* Wills; sums given in rupees; and it never was contended, that, if payment was to be made here, it should be with *Indian* interest. The present inclination of my opinion is against this claim: but I will look into it.

The MASTER of the ROLLS (24).

Dec. 22d,

This Petition of re-hearing is presented upon the ground, that the decree directed interest at 4 *per cent.* only. The testator gave legacies in the currency of *Jamaica*, where he resided; and it is contended, that they ought to carry *Jamaica* interest. He had personal property in *England* and in *Jamaica*, and he appointed *English* and *Jamaica* executors. It does not appear, that the *English* executor has received any remittance since the testator's death. The legatees might have sued either the *Jamaica* executors in *Jamaica*, or the *English* executor in *England*. They have preferred the latter, and to take payment out of the *English* fund. Therefore, I think, they cannot have *Jamaica* interest. I should think so, even if some part of the property had been remitted here. The principle, upon which interest is computed upon legacies from a year after the death of the testator, is the presumption, that the property is got in at that time, and is making interest. I cannot presume, that the *English* executor made *Jamaica* interest; or, that the property in the hands of the executor in *England* is carrying *Jamaica* interest,


Interest upon legacies from a year after the death, upon the presumption that the property is got in by that time, and making interest.

The authorities are not uniform. In *Saunders v. Drake* it appears by the Register's Book, that *Jamaica* interest was given. The main point contended was, whether the legacy should be in *Jamaica* or *English* currency.

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(24) The judgment *ex Relatione*.

currency. The testator had property in both countries. Lord *Hardwicke* gave *Jamaica* interest: but in *Stapleton v. Conway* (25), a subsequent case, eight years afterwards, he appears to have entertained a different opinion. In *Pierson v. Garnet* (26), before Lord *Kenyon*, one question was, whether the payment was to be in *English* or *Irish* currency; and though it does not appear by the Report, it is well known, Lord *Kenyon* gave 4 per cent. (27) In *Malcolm v. Martin* this point was directly considered by Lord *Alvanley*. It was not argued either in *Pierson v. Garnet*, or *Saunders v. Drake*. In *Raymond v. Brodbelt* the case before Lord *Alvanley* was cited as decisive of the point. Lord *Rosslyn* does not disapprove Lord *Alvanley*'s decision; but gives the reasons for his opinion, that under the circumstances of the case before him *Jamaica* interest should be given. It is very clear, Lord *Rosslyn* did not mean to lay down any general rule. All the argument in that case turned upon the particular circumstances; especially the argument of the present Lord Chancellor, then Attorney-General, that *Jamaica* interest ought to run on to the time of payment: the property having been in *Jamaica* some time; and, while there, carrying *Jamaica* interest; and having been remitted upon advantageous terms in the course of exchange, giving a profit, at least equal to the *Jamaica* interest. Lord *Rosslyn* does appear to me not to have in any manner over-ruled Lord *Alvanley*'s decision, but rather to have confirmed it.

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I am therefore of opinion, that this Decree ought to stand.

(25) 1 *Ves.* 427.

(27) 3 *Bro. C. C.* 53.

(26) 2 *Bro. C. C.* 38.

1804.

Dec. 24th.

1805.

Jan. 11th.

Purchase of the Impro-
prie Rectory
of *Clerkenwell*
for the use of
the parishion-
ers and inha-
bitants. The
nomination of
the Curate had
been by de-
cree declared
to be in the
parishioners
and inhabit-
ants, paying
to Church and
Poor. The
*Lord Chan-
cellor* express-
ed an opinion,
that assess-
ment gave the
right; though
actual pay-
ment had not
been made:
but an Elec-
tion, on that
principle, was
not disturbed
on the ground
of common
consent: no
objection hav-
ing been made
at a general
meeting; and the parish having no representative meeting in vestry
for this purpose.


THE ATTORNEY-GENERAL v. FORSTER.

THE object of this information, filed at the relation of several parishioners and inhabitants of *Clerkenwell* was, that the election of the Defendant *Forster*, as curate of that parish, may be declared void; and, that another election may take place according to the deed of 1656, and a decree in the Court of Exchequer. By that deed the Improprⁱate Rectory of *Clerkenwell*, having been purchased by the parish, was conveyed to the churchwardens, for the use of the parishioners and inhabitants for ever. By the decree the right of nomination to the curacy was declared to be in the parishioners and inhabitants, paying the rates and assessments to the church and poor. Upon the late vacancy a meeting took place; and certain regulations were adopted, with the consent of the parishioners, who attended the meeting, and of the candidates, for conducting the ensuing election. One of those regulations provided, that every person assessed, whether he has paid or not, shall vote, unless legally discharged and marked poor. The election having been conducted upon that principle, a motion was made on behalf of the relators for an injunction, to restrain the churchwardens from nominating to the Bishop of *London*, and the Bishop from granting his licence to, the Defendant *Forster*.

The *Attorney General*, Mr. *Richards*, and Mr. *Trower*, in support of the Motion.

The regulation, that every one, assessed to the church and poor, whether having paid the rate or not, may vote, unless legally discharged and marked poor, the custom being not to pay the rate till the end of the year,

year, must give the right to any one, whom the church-wardens chuse. Upon the prospect of an election paupers of the lowest degree may be put upon the list of voters. There can be no legal discharge except actual payment. The consequence will be, that the election will depend upon persons, who have not paid, and in all probability never will pay: the object of the decree in the Court of Exchequer, being to fix the right in persons paying the assessments. The suit, formerly in this Court, *The Attorney General v. Parker* (28) upon the election to this rectory, did not declare the right; which stands only upon the decree of the Court of Exchequer; and the criterion of *payment* rests, not only upon that precedent, but also upon principle: the purchase of this rectory being made out of the parish stock, the right ought to be in those, who contribute to that stock. This election was not conducted upon the principle of that decree; which ought to have been the law; and which in a trust of this nature it is not competent to the candidates, or any one else, to waive; offering to the Bishop a person not duly elected according to law.

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2dly, According to these regulations persons not resident are admitted to vote. The term "*Inhabitants*" has been in many instances applied to persons, occupying lands, though not residing in the parish; as, for the purpose of taxation. So the word "Parishioner" has different significations: as to paying rates, a resident: as to taking parish apprentices, persons having property. This was not a regular act of vestry, capable of binding the parishioners; and the majority could not bind those, who were absent.

Mr.

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Mr. *Romilly* and Mr. *Hart*, for the Defendant.


This Information and Bill do not call upon the Court to determine the right of election; assuming, that the right of election is already ascertained. First, the Court has no jurisdiction: 2dly, not for these Relators or Plaintiffs. These regulations were adopted at the instance of the two candidates. The question in the Court of *Exchequer* was the same as in *The Attorney General v. Parker*, whether the right of election was in the inhabitants at large; or in those only, who were assessed to the parish rates; not upon the distinction between assessment and payment. In *The Attorney General v. Parker* there is a declaration as to the right of election, upon the evidence of usage. The construction of the decree in the Court of *Exchequer* must be, persons, whose situation in the parish calls upon them to bear the burthens of the parish. If actual payment had been intended, it would have been more strictly expressed. That construction might exclude the best persons in the parish. The expression is adapted to the circumstance, that this must always be a fluctuating body. A decree, such as is the object of this information, a scrutiny in the Master's Office, was never before conceived.

The Lord CHANCELLOR.

The questions are, 1st, What the Court is to do with reference to the equitable title of the parishioners and inhabitants of this parish? 2dly, Whether the judgment is to be influenced by what has actually passed in the parish, in which suits after suits have arisen in every period of the last century? This deed of 1656 was a deed of purchase out of the parish stock of the rectory: silent with regard to the persons, upon whom the duty of providing a rector should lie; which is a

• trust

trust and duty, as well as a right of presentation to the benefice. The parish stock having purchased the legal estate in what would represent the advowson of this curacy, if I may so express it, the legal interest is vested in trustees; who are bound to nominate the person according to the direction of the *Cestuis que trust*. The consequence is, that, inconvenient as it must be, perhaps destructive of the very end and purpose, for which this right of presentation was given, harassing and vexatious as experience has proved it, the right must vest in the parishioners, in some sense of that word. Accordingly, from the decree in 1768, it appears, the parishioners never yet found, in whom the right exists; and the same doubt has prevailed in the minds of the most enlightened judicial characters. The construction, if now to be made for the first time, would introduce questions of great difficulty, as well as great importance. According to the authority of Lord *Hardwicke* usage would interpret the deed against the effect of any exposition upon the mere terms of the deed itself, if there was nothing else to resort to; and Lord *Hardwicke* seems to think, he ought not to carry the usage, though that would decide it, beyond what it clearly warranted, against the terms of the deed; and that the usage would introduce a considerable body of evidence to prove, that housekeepers, whether rated, or not, much more, whether they had paid or not, were entitled to vote. It appears, the usage had varied continually upon the very point, on which there has been so much discussion. The case in the Court of *Exchequer* is in conformity with Lord *Hardwicke's* opinion. As to the validity of the existing election, the Court looked to all the circumstances of fact in the parish; with a view to determine, whether there was any usage, authorising them in the decree to give an interpretation to the equitable effect of the grant of

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the rectory, not to be found in the terms of that grant. They make a declaration, which according to my opinion does not effectually remove the doubt, that the right of election of the minister or curate is in the parishioners and inhabitants, paying to rates and assessments to the church and poor.

Various senses  
 of the term  
 "inhabitant,"  
 with reference  
 to the nature  
 of the subject.

The first question is, who are the parishioners? the next, who are the inhabitants? As to the latter, no words are capable of a larger or more limited interpretation. It was decided in Lord *Coke's* time, that a man, living in *Cornwall*, may to many purposes be an inhabitant of *London*; that is, by having property liable to the repair of bridges. The construction is always to be made with reference to the nature of the subject; and the right of election may by usage be confined to a very small number. As to the word "pay," there is no doubt, in a strict sense persons paying are those, who have paid. But in a popular sense persons paying to Church and Poor may be understood persons liable to pay; and, if in ordinary parlance persons liable to pay were excluded, the greater part would be excluded. If Lord *Hardwicke's* principle, that originally a very large interpretation ought to have been given to the deed, and the usage, will justify another construction, the clear, grammatical, meaning, though to be attended to, is not conclusive. The parishioners have as much difficulty in understanding this decree, as they had, before it was made; and I have so little hope of removing all doubt, that I recommend them to procure an Act of Parliament to regulate their proceedings in future. •

As to the particular circumstances, attending this election, those, who were voluntarily absent, cannot expect, that their objections should be very strenuously maintained by a Court of Justice. They should have  
 appeared

appeared at the election, to object, at least, if not to assert their rights; of which they must be considered conusant. They were to exercise their right according to their duty, to find out the most proper individual. It is much to be lamented, that these elections should be carried on in a way, that sows dissention and hatred, where harmony ought to subsist. It must be considered, what the Court would have said, if an application had been made immediately after the election by persons appearing there, and protesting against any proceeding, against any vestry; and insisting, they have a right to complain of any election, unless conducted upon different principles; and Lord *Hardwicke* has truly observed, that this is not to be looked at as a vestry. I should be sorry to have it supposed, that the Court is to send a scrutiny to the Master. The Court of *Exchequer* proceeded another way; requiring proof previously, in order to make the election void; and then directing another election. The question might properly be sent to an issue: the Court arranging the points, to which proof might be addressed. Another consideration will be, whether they have acquiesced; and, supposing the right, regulated by agreement, as subsequent usage may prove it to have been exercised, whether the right may not have been waived. Originally, independent of the decisions, I should have had considerable doubt, whether the Court would have executed such a trust. Some of the cases of charitable dispositions come very near this; and the Court has thought, they could only be executed *Cy pres*; and it would have been questionable, whether a parish could take it. But that is shut out by decision. Lord *Hardwicke's* principle is the true one; that a parish as to a trust of this nature acts by different means and organs from those, by which vestries can conduct it. As to the exertions of the friends of the candidates, and their publications, what-

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ever inferences arise from those circumstances depend upon the point, whether that is the legal mode for the parish to act with reference to such a trust as this.

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1805.  
 Jan. 11th.

*The Lord* CHANCELLOR.

This case comes before the Court upon a motion, to restrain the Defendants, the Churchwardens, from nominating to the Bishop of *London* the other Defendant *Forster*, alleged to be duly elected by the Parishioners and Inhabitants to the Curacy of *Clerkenwell*; and, if the nomination has been made, to restrain the Bishop from granting his licence to perform the functions of that curacy. The Information is filed by the *Attorney General*, at the relation of individuals, stating the deed of 1656, the proceedings in the Court of Exchequer, between the years 1760 and 1770; in effect praying, that that decree may be acted upon, and properly expounded; that the late election may be declared void, and that another Election may be had, agreeable to the true intent of the deed, as expounded by that decree in the Exchequer. *Drake*, having purchased the Improprate Rectory, was bound by law to find a Minister in the person of a Curate, to be named by him. Those, under whom he derived title, had been under an obligation to pay to the clergyman between 3*l.* and 4*l.* a year. That purchase became a purchase for the benefit of the parishioners and inhabitants of *Clerkenwell*; and, they becoming the lay owners, their trustees were subject to the same obligation of providing a person to do the duty; who would be entitled to that pension; and those, for whom the Improprate Rectory was held in trust, have the right and the duty of nominating that curate.

Upon

Upon this case it struck me at first, as a point of considerable doubt, whether the Court should execute such a trust. If it was unprejudiced by decision, that doubt might be maintained by strong argument: but it is too late now even to state it; for there is authority binding my judgment entirely upon that. I have looked through the Notes of Lord *Hardwicke*, undoubtedly a very great lawyer; with reference to his knowledge both of common law and equity perhaps much more eminent than the Counsel of that day, great as they were, are in comparison with those of the present time; for it has frequently struck me, that the discussion at the bar at that period was by no means equal to that of the present time. From some notes Lord *Hardwicke* appears not to have entertained any doubt, that he was bound to execute the trust; and what passed in the Court of Exchequer leaves it impossible to state a doubt, that the Court must execute the trust.

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Every lawyer must have felt great difficulty in laying down a clear criterion as to the description of persons to nominate under the terms of this deed of 1656; and after all the litigation, that has ensued, and even judicial expositions, there are not, I believe, many professional men, who can say precisely, what a Court of Justice would hold the meaning of these words, “ parishioners and inhabitants,” with reference to this subject. From the date of the deed downwards that question has been in continual controversy. It is not necessary to detail those controversies, previous to the case of *The Attorney General v. Parker*. Though I find that case among Lord *Hardwicke*’s notes, I have not been able to find any manuscript note by Lord *Hardwicke*, giving his judgment in detail. It came on upon an Information by *The Attorney General*; insisting, that *Doughty* was not duly elected; leaving in doubt whether

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whether *Warneford* was duly elected, or not; but stating, that in fact *Doughty's* election was not according to the true intention of the deed, and praying, that it should be declared void; making the Churchwardens, admitted to be the returning officers, parties; and praying the establishment of the charity. The objection was upon two grounds. First, it was said, there was not due notice of the Election; that the notice for the 24th was countermanded by what happened in the mean time; and that the Election, immediately after a meeting to settle the time and manner of Election, was a surprise upon the parishioners, and therefore bad. It was stated in argument, that the opinion of a Civilian had been taken; asserting, that the notice was proper; and, having been once given, it could not be countermanded. Lord *Hardwicke* in his note expresses, that his opinion agrees with that; and, that the Election was duly had notwithstanding that intermediate proceeding. The next point against the Election was, that it had been made by housekeepers; and it was insisted, they do not answer the description of parishioners and inhabitants; that at least they must be persons paying to Church and Poor. To that different answers were given: 1st, That the candidates and their friends had agreed, that the right should be exercised *pro hac vice* by housekeepers, whether paying to Church and Poor, or not: or, whether or not, they rented such tenements as would make them parishioners under the settlement acts; that the fact of being housekeepers should be the criterion: farther, that neither according to the intent of the deed, or the usage, cotemporary or subsequent, was there any such restriction as payment to Church and Poor. Many witnesses were examined on both sides as to that; and the weight of evidence both according to Lord *Hardwicke's* note and the Report in *Vesey*, appears to have been, that that was not a necessary qualification;

tion; if the necessity of that qualification was to be settled by the usage; and there was no difficulty either at the bar or upon the bench in holding, that such an instrument was to be construed by the usage, contemporaneous and subsequent. But it does not follow, that it might not appear in a subsequent case, that the real weight of evidence was the other way. Lord *Hardwicke*, not according to his usage to put down the short principle, that governed him, has said only, that he dismissed the information with costs. But the passages, appearing to be his notes of the argument, particularly at its close, shew his opinion, that it was difficult, if not impossible, to hold, that the information was a due proceeding; for he thought, the only object of an information by the *Attorney General* was to secure the revenue of the Curate, who was to do the duty: viz. the stipend, between 3*l.* and 4*l.*; and as to the nomination by the trustees to the Bishop, &c. it was all a private suit; as if there had been trustees of an advowson, or any other preferment: the *Cestuis que Trust* calling upon them to exercise the legal right in them according to the trust; and, I doubt, whether the information was not dismissed upon that principle, as much as upon any other; when it was found, that the Election could not be disturbed. Perhaps in that case, more particularly with reference to the circumstance, that the *Attorney General* was a party, the argument might be raised very high, that the agreement among the candidates, or the Vestry, which, Lord *Hardwicke* observes, is not the representative of the parish for this purpose, could not determine the validity of the election. But Lord *Hardwicke* seems to have been of opinion, first, that in fact the evidence did not prove any such qualification upon the right of voting, though I repeat, that might appear differently in a subsequent case: 2dly, that, if the *Attorney-General* had nothing to say

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as to the revenue of the curate, the rest was to be looked at upon the principle of a suit; and the parties might be bound by their conduct in the transaction.

In the case, that occurred in the Court of Exchequer afterwards, the form of proceeding was the same. By the decree it appears, a great variety of evidence was tendered, as to which there is no trace, that a great part of it was submitted to Lord *Hardwicke*. It might therefore well be, that, though Lord *Hardwicke* had a strong opinion, that he could not fix the qualification upon the right to vote, that the parishioners and inhabitants should pay scot and lot, the Court of Exchequer might be right upon the evidence before that Court in holding, that the person voting must be a parishioner and inhabitant in some sense paying to the Church and Poor. It is very difficult to collect the amount of the evidence. A great deal of it consisted of exhibits, not now before the Court. The determination was, that the right was in parishioners and inhabitants, paying scot and lot: *incertum per incertius*, perhaps; for it is very difficult to say, what those terms mean: but, until disturbed, it is a judgment, that must bind the parties. It is useless in any view of the case to state the great variety of interpretations, of which those words are capable. The Court in that case thought the election void; and gave all the consequential directions, which Lord *Hardwicke* upon his principle would not have given, if the election was considered good, as to establishing the right. At least he states a doubt upon that; and says, that gentleman might remain curate 40 years; and he would not anticipate an election, that might never occur; and would not therefore give any directions. The decree of the Court of Exchequer relates to the next election; except only the beginning; which meant to regulate all future elections.

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Upon the present occasion, arising from the death of the late curate, they find it very arduous to extricate themselves from all these difficulties; and it is much to be lamented, that such scenes should take place upon the nomination of a minister: preaching candidates for popular favour, elected under all these circumstances of contention and litigation, that have existed in this parish above a century. But I have simply to consider the civil right. I must take both these persons to be fit for this sacred office. The inhabitants properly and wisely, provided they could bind themselves, laid down certain rules. The objection goes not much farther than this; that the rule, that persons assessed, though they had not paid, should vote, is not agreeable to the decree in the Court of Exchequer; and if not, that the conduct of the parties has not shut their mouths; but that persons, not present, had an interest in the mode of election; and, though no objection was made at the time, it ought to be considered a nullity. Upon the first of these objections it is not necessary to give my opinion; the inclination of which is, that these words are not to be taken in that strict sense, that requires the actual payment. But upon all the circumstances, if the *Attorney General* has not an interest in this proceeding, such as to destroy every thing done by consent, I must take this election upon these principles to have proceeded upon common consent; for it is not possible for such a body as a parish, not having any representative meeting as a body for this purpose, not in vestry, as Lord *Hardwicke* observes, to make an election by consent, if they have not under these circumstances; I do not think, the mere absence of persons, not making any inquiry, not attending to vote, or to object, in a case, where the rule, as delivered in the Court of Exchequer, is so doubtful, is an objection, that ought to destroy this election under the circumstances. At the hearing I should not disturb this

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this election; and, if not, I should be extremely sorry to keep alive by a useless prolongation of the cause the unhappy dissensions; that have prevailed in this parish; and I hope, the parish will feel, that the most important interest they have is in the maintenance with respect and parochial affection of a minister, competent to do his duty towards them; that it is extremely difficult to find such a person, placed there under such circumstances; and that their best course will be to regulate their proceedings, if they can, by some Act of Parliament (29).

(29) See the termination of this suit, post, *The Attorney General v. Newcombe*, Vol. XIV, 1. See also as to the right of Election, and the proper mode of suit in these cases, whether Information or Bill, *Fearon v. Webb*, XIV, 13, *Attorney General v. Fowler*, XV, 85. *Davis v. Jenkins*, 3 Ves. & Bea. 151.

1805.
 Jan. 14th.
 A partner, retired upon a bond for the balance, due to him, and a covenant of indemnity, with a Surety, being upon the bankruptcy of the remaining partners arrested by

FELL, *Ex parte*.

THE petitioner carried on business with two persons, who afterwards became bankrupt, as *Blackwall Hall* factors and warehousemen, under indentures, dated the 24th of April, 1802. By a deed, dated the 29th of March, 1803, reciting, that the petitioner was desirous to withdraw from the partnership upon being paid the money, brought in by him, it was agreed, that the partnership should be dissolved as to him; that the balance, due to him, was 60*l.*, and that he had agreed to assign to the remaining partners all his share in the stock, &c. upon the joint creditors, his Petition for the application of the specific stock and debts of the old partnership to the creditors of that partnership in preference was dismissed; with liberty to file a bill.

upon being indemnified, as thereafter mentioned, in which indemnity *Joseph Croskey* agreed to join, as surety, it was declared, that the partnership was dissolved; and the petitioner in consideration of the said sum of 60%, to be paid, as after mentioned, and for the other considerations therein expressed, assigned the stock, &c. and the remaining partners, and *Croskey*, as surety, covenanted and agreed, that the remaining partners should upon the 1st of *April* pay a sum of 60%; and should in due time discharge all debts due from the partnership of the three; and that the remaining partners and the *said surety should indemnify the petitioner from all such debts, &c.

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Ex parte.

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Upon the 2d of *April* the dissolution of the partnership was advertised. The bankruptcy happened in *October* 1803. The petitioner being arrested by creditors of the old partnership, the prayer of the petition was, that the specific stock and debts of the old partnership may be applied in satisfaction of the creditors of that partnership in preference to the creditors of the new firm.

Mr. *Romilly* and Mr. *Hart*, in support of the Petition, distinguished this case from *Ex parte Ruffin* (30), and a subsequent case, *Ex parte Snow*, upon the circumstance, that in those cases the assignments were absolute.

Mr. *Hollist* and Mr. *Toller*, for the assignees, relied upon *Ex parte Ruffin* and *Ex parte Snow*, as deciding the question.

The Lord CHANCELLOR.

This falls precisely within the same rule as to the two late cases; for the meaning of the transaction is to transfer

(30) *Anto*, Vol. VI, 119; see the note, 129.

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*Ex parte.*

fer the property from three to the two; and the property is in the order and disposition of the bankrupts within the Statute (31) at the period of the bankruptcy. As I said in the former case, if they think proper to file a bill upon it, I will not preclude them. It would be very easy to avoid this upon the retirement of a partner by assigning all the effects upon trust to pay the debts.

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The Petition was dismissed.

(31) Stat. 21 Jac. I. c. 19, post, Vol. XIX, 491; see s. 11. *Ex parte Martin*, the note, 494.

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1805.

Jan. 12th,

14th, 19th.

Agreement on marriage by the husband as speedily as may be to settle 40l. a year upon his wife, to be paid from his decease: a sum of money to be invested in stock for the purpose of raising that

GRANGER, *Ex parte.*

BY articles, executed upon the marriage of *Joseph Granger* with *Elisabeth Colpitts*, it was agreed, that *Joseph Granger* shall as speedily as may be settle upon *Elisabeth Colpitts* 40l. a-year during her natural life, in case she survives him; which payment shall take place from his decease; but, that the interest and dividends, arising from a sum of money, to be invested in the 3 per cent. Annuities for the purpose of raising the annual sum of 40l., shall in the mean time be received by *Joseph Granger*; and, in case there shall be issue of the marriage, that he shall have the power of disposing of the capital for the use of that issue by Will or Deed, as he shall

annual sum: the dividends for the husband for life: the capital for the issue, &c. Under the husband's bankruptcy proof allowed by the wife and children for 800l.; amounting to a covenant to pay that sum upon the marriage; and upon the principle of arrears of an annuity due before the bankruptcy.

shall think fit; and in failure of issue that *Elizabeth Colpitts* shall have the sole disposal of so much as amounts to 500*l.*, being the portion *Joseph Granger* received with her; and that, if he survives, the dividends of that sum shall be received by him for his life.

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*Ex parte.*

A Commission of Bankruptcy having issued against *Joseph Granger*, and no sum of money having been invested according to the articles, this petition was presented by his wife and children; praying, that some person on behalf of the petitioners may be admitted a creditor under the Commission for 800*l.*, or such other sum as shall be sufficient to produce an income of 40*l.* a-year; or at least for the sum of 500*l.*

Mr. *Romilly*, in support of the Petition.

Mr. *Cullen*, for the Assignees, opposed the Petition; insisting, that no case had gone to this extent; that it was a mere covenant or agreement as speedily as possible to lay out a sum of money, to produce an annuity; and cited *Uttersen v. Vernon* (32).

[ \*350 ]

*The Lord CHANCELLOR.*

If the real meaning of this agreement is a covenant as speedily as may be to invest a sum of money in stock sufficient to produce an annuity of 40*l.*, that differs from *Uttersen v. Vernon* in this respect; that this bankrupt was under an obligation without any step taken by the other party: in that case it was to be upon demand made; and no demand had been made at the period of

(32) 3 *Term Rep.* 529. 334. *Ex parte Coming*, IX, 4 *Term Rep.* 570. See ante, 115; and the note, VII, 303, *Ex parte King*, Vol. VIII, *Ex parte Day*.

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 GRANGER,  
*Ex parte.*

of the bankruptcy. I am inclined to think, this should be proved.

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Jan. 19th.

Mr. Cullen, for the Assignees, obtained leave to speak to the question again.

In the case of a mere agreement to invest a sum of money to produce an annuity, even admitting the agreement to have been broken before the bankruptcy, there is no instance, in which the proof has been admitted. It has been determined, that, where the party has a double remedy, as, where there is a bond with a penalty, and a covenant, he need not have recourse to the remedy by the bond; but may resort to the covenant; and upon that the certificate would not be a bar: *Cottrell v. Hook* (33). That was a strong case for allowing the certificate to bar the demand: but it was held no bar to the action of covenant. So debt for rent is barred by the certificate: but not the personal covenant. In this instance there is no sum ascertained.

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 Bond and covenant to secure an annuity. Though the bond is barred by the Certificate in Bankruptcy, the penalty being forfeited by a breach, the annuitant may proceed upon the covenant for subsequent breaches; which could not be proved.

*The Lord CHANCELLOR.*

It is clear, if there is a bond to secure an annuity, and also a covenant, though the bond is forfeited before the bankruptcy, and therefore the certificate is a bar as to that, it does not bar the action for breaches of covenant subsequent to the bankruptcy. But I have always taken it to be settled, that the arrears of the annuity, actually become due, might be proved. I have always understood the law as to annuities to stand thus. Where there is a bond and a covenant for payment of an

(33) *Doug.* 93.

an annuity, if there is a breach, the penalty is forfeited. The annuitant deals with it, as he may according to law; for it will stand in effect as a security for the payment; by which you may compel the payment of what is due, and to become due. He may prove under the bond; and the certificate will be a bar to the debt upon the bond by breach of the condition: but, if he chooses to rest upon the covenant, what is due at the bankruptcy is a debt; and may be proved: but the growing payments are not; and therefore cannot be proved. I have considered this so well settled, that it was the foundation of my doubt upon the case of *Edie v. Anderson* (34); in which it was said by Lord *Kenyon*, that you may insure a debt. I remember, his Lordship said, that past payments of an annuity were not insurable; as they were a debt; but that future payments were insurable; as they depended upon a contingency; and he held, that the creditor might insure the life of the debtor; upon the ground, that he has a better chance of getting his debt, while the debtor is living. Why may not the creditor also for the same reason insure the debtor's house or ship? But he considered the doctrine settled, that the bye-gone payments were a debt; and therefore not insurable.

1806.

GRANGER,  
*Ex parte.*

Upon this case the ground of my judgment is, that this was in substance and effect a covenant, that the husband would upon his marriage pay a sum of money, which would produce in dividend the sum of 40*l. per annum*; and, if so, the moment the marriage took place, and the time elapsed, within which that gross sum could be paid, it was a payment, secured by a covenant to produce

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(34) See ante, Vol. VII, annuity may be proved in 302. By statute 6 Geo. IV, bankruptcy. See the note, c. 16, s. 54, the value of any Vol. V, 709.

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*Ex parte,*

produce a sum, to give an annual fruit, it is true: but the moment the time was over it stood upon the same principle as the arrears of an annuity, become due before the bankruptcy. The debt to be proved appears to me to be the gross sum.

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The Order was for liberty to prove the sum of 800*l*.

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1805.

Jan. 16*th*.

The Court refused to order dividends, received before the bill filed, of stock, purchased by the old Government of *Switzerland*, to be paid into Court by the trustees on the application [\*353] of the present Government, without having the *Attorney General* a party.

## DOLDER v. THE BANK OF ENGLAND.

A MOTION was made in this cause, by the Plaintiffs, constituting the present Government of *Switzerland*, that the Defendants Lord *Huntingfield* and Mr. *Walpole*, in whose names, as trustees and agents, a sum was invested in the funds of this country, under a purchase by the governments of *Berne* and *Zurich*, existing before the Revolution, should pay into Court the dividends, received by them previously to the filing of the bill (35). No Order had been made either as to the capital or the dividends: but the Bank and *South-Sea House* refused to pay the dividends, since the bill was filed. The Defendants Lord *Huntingfield* and Mr. *Walpole* by their answer admitted themselves to be trustees; but stated, that the Government had ceased to exist in consequence of the Revolution.

Mr. *Romilly* and Mr. *Bell*, in support of the Motion.

The Lord CHANCELLOR asked, whether the *Attorney General* was a party.

Mr.

(35) This fund was the subject of a former application. See *The City of Berne in Swit-*

*zerland v. The Bank of England*, ante, Vol. IX, 347.

Mr. *Richards* and Mr. *Hollist*, for the Defendants  
Lord *Huntingfield* and Mr. *Walpole*.

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The *Attorney General* is not a party. The bill states, that the original body, who entrusted this fund to these Defendants, is dissolved. The answer states, that the new body, substituted in their place, is also dissolved. The Government of this country does not acknowledge the Government, in whose right these Plaintiffs sue. The Court cannot agitate the question without the presence of the *Attorney General*. A considerable question is, whether upon the statement of the Plaintiffs the Crown has not the property; upon the principle adopted in the case of the Province of *Maryland* (36), that the fund did not belong to the State, formed in consequence of the dissolution of the former State, though acknowledged by this country at the time; but that it belonged to the Crown. Another objection is, that part of this fund appears by the bill to be assigned to *St. Didier*, at *Paris*, an avowed enemy of this country.

Mr. *Romilly*, in Reply.

The proposition, upon which this application is resisted, amounts to this; that, if a foreign state invests money in this country, and afterwards chooses to make any alteration in their Government, that fund is thereby \* transferred to the Government of this country. Is this property derelict: or what gives the Crown any interest?

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*The Lord CHANCELLOR.*

There is a great distinction between the *Maryland* Stock in the Case and this. That was a case, in which the old Government existed under the King's Charter; and a change took place by a Revolution; and, though the new Government Funds of this Country, the property of the American State of *Maryland* before the Revolution,

(36) Ante, *Barclay v. Russell*, Vol. III, 424.

after that event held to belong to the Crown as *bona vacantia*.

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vernment was acknowledged by the Government of this country, yet this Court held, and properly in my opinion, that the property, which belonged to a corporation, existing under the King's Charter, was not transferred to a body, which did not exist under his authority; and therefore the fund, being in this country, was to be considered as *bona vacantia* in this country, belonging to the Crown. The question as to the property of a foreign country, not created under the authority of the King, transferred in consequence of a change by any circumstances to a succeeding Government, is perfectly distinct. Another, and a very considerable, question is, whether, if that subsequent Government was never acknowledged by the Government of this country, the Municipal Courts, merely administering the Law of this country, can act upon it. Some perplexity arises from what we know and what we can only know judicially. I cannot affect to be ignorant of the fact, that the Revolutions in *Switzerland* have not been recognized by the Government of this country: but as a Judge I cannot take notice of that. While that fact however, which will make a vast difference in the decision, is in doubt, the question is, whether money, actually received, before this bill was filed, is to be called back in this Court; all the parties, having an interest in the possible disposition of this money according to law not being before the Court.

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It is said, first, these persons have not the right themselves. In point of law they have the right against all the world except the persons entitled. It is next said, they admit themselves to be trustees for some person. That is nothing to the Plaintiffs, if the Defendants are not trustees for them. It is then said, they can be trustees for no one else. Suppose, it could be put by analogy upon the point in *Burgess v. Wheate* (37): claiming for

(37) 1 *Black.* 123.

for their own benefit, it is of no consequence, that they were originally trustees. Then, taking them only as agents, for instance by a Power of Attorney: if they receive the money, as still authorized, it is not duly received: but it does not therefore follow, that they will remain trustees or agents for the persons, succeeding those, who gave them authority. The question is, whether they do not retain them for themselves, or for the persons, succeeding those, who gave them authority; or, whether they are trustees for the Government of this country. Until therefore the Plaintiffs prove, that they are entitled, it would be too strong to take out of the hands of these Defendants money received, before any bill was filed: at least, until other parties are made: so that I may be sure, all persons are before the Court, among whom there will be found some one, who is entitled. You may make the motion again, making the *Attorney General* a party, if you please.

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ABELL v. SCREECH.

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Dec. 14th.  
1805.  
Jan. 23d.

UPON a bill by creditors, on behalf of themselves and others, against the administratrix, after the usual decree, a motion was made by a creditor, that \*it may be referred to the Master to tax his costs, incurred in proving a sum of 427*l.* 3*s.* 9*d.* reported due to him from the estate of the intestate; and that what may be reported due on account of those costs may be paid to him out of 1614*l.* 19*s.* 7*d.* cash in the name of the *Accountant-General* in trust in the cause. This motion had been made some time before, when the *Lord Chancellor* thought it reasonable; but, having doubt as to the practice, directed a search for precedents.

Costs of proving a debt before the Master [ \*356 ] under the usual decree upon a creditor's Bill not allowed.

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Mr. *Thomson*, in support of the Motion.

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If this application cannot be complied with, a creditor may be put to an expence, greater than the amount of his debt; and in consequence of the decree he cannot assert his right elsewhere; but must come in before the Master. Two instances have been found: *Lord Orwell v. Lord Hinchinbrooke* (38), which afterwards assumed the title of *Vernon v. Montague*; and a late case, at the *Rolls*: *Skeene v. Pepper* (39). Those cases were upon the bills \* of creditors; like this: in the latter certainly the point was not suggested to the *Master of the Rolls*; and it passed without observation.

*The*

(38) *Lord Orwell v. Lord Hinchinbrooke: Vernon v. Montague*: in *Chancery*, 28th of *March*, 1776. Reg. Book 1775, fol. 252.

Mr. *Madocks* moved on behalf of several creditors, by name; stating the Decree; and that the said creditors had proved their debts before the Master; and had been at a considerable expence therein; and praying, that the Master may tax the costs of the said creditors in proving their debts. The cause arose upon the Will of the Earl of *Halifax*; devising an estate for payment of debts; and giving other property to supply the deficiency. The usual decree was made for creditors to come in, and advertisements, &c.

The Order directed the

Master to tax the costs of all the creditors, who have come before him, and proved their debts.

(39) *Skeene v. Pepper*: at the *Rolls*, 3d *July*, 1804.

The Order directed, that the Master should tax the subsequent costs of all parties to this suit, and declared, that the creditors of the testator are to be at liberty to go in before the Master, and prove their costs, if any, of the several actions at Law, brought by them to obtain payment of their debts, and their costs in this cause; and it was ordered, that the parties' costs, already taxed, and the said subsequent costs, when taxed, be paid out of the sum of 870*l.* cash, in the *Accountant-General's* name, &c.

*The Lord* CHANCELLOR.

The difficulty upon the precedent in 1776 is, that if any creditors are to be allowed their costs, it must of necessity follow, that all should be allowed their costs. That case arose upon the distribution of a great nobleman's estate; and, I believe, some feelings of generosity prevailed in that instance. Upon what ground can it be done in one case, unless there is some special direction in the Will or Deed, creating the trust? If a creditor takes out administration, in order to support the suit, that the suit of the creditors might go on, I have known it allowed in that instance: but that is not as creditor. I will speak to the *Master of the Rolls* upon it.

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The motion was again made on the 1st day of *Hilary* Term; when the *Master of the Rolls* was present with the *Lord Chancellor*. No other precedent was produced: but, in support of the motion it was pressed, that, though in the common case of a creditor, called upon by a decree to come in, and prove his debt, the expence was trifling, a case might occur, and this was an instance, in which the creditor might be put to costs greater than the amount of his debt; and he cannot proceed at Law; where he would get his costs.

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*The Lord* CHANCELLOR.

The leaning of the Court now is to give the Plaintiff his costs, as far they can; provided there are assets. But the general proposition is, that an executor does not pay costs, rather than that he does. That was much discussed in the Court of Common Pleas in the year 1789 or 1790. When this motion was first made, it struck me as of great consequence and much novelty; for the course of the Court in the administration of assets is to compel all creditors to come before it; and the executor could

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could not be safe, unless this Court would prevent their proceeding at Law. This is an application, not for costs according to the ordinary course of the Court, but upon this ground; that there has been more than usual difficulty in proving the debt in the Master's office. It struck me, that, if this application is to be sustained upon that ground, it must be very familiar; and, if not authorized by precedent, the Court would be called upon in most cases to determine, whether there is not so much difficulty in establishing the debt of each particular creditor, that it would be fit to distinguish his case; and to lay down one rule for one class of creditors and a different rule for another class. The cases that have been produced, are only one, in 1776, that has not been followed; and another, lately; in which the point was not particularly discussed. I could not induce myself, without the sanction of the *Master of the Rolls*, to establish this practice; and the inclination of my opinion is, that it is too dangerous.

*The MASTER of the ROLLS.*

[ \* 359 ]

Every creditor, coming in before the Master, incurs some expence: yet it is admitted not to be of course, but, that a special application to the Court is necessary to warrant the Master to tax the costs of the creditor; and therefore the degree of expence will come into discussion in each case. In that there would be much inconvenience, and a great deal of difficulty; which ought to be very well considered, before such an application is granted.

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No Order was made (40).

<p>(40) The 6th Resolution, 2 <i>P. Will.</i> 27, <i>Maxwell v. Wettenhall</i>, that a creditor, or legatee, coming in before the Master, and not a party in the cause, shall have his</p>	<p>costs, was not noticed. See <i>Beames, on Costs</i>, 18, 79. <i>Goate v. Fryer</i>, 3 <i>Bro. C. C.</i> 23. <i>Harvey v. Harvey</i>, <i>Waite v. Waite</i>, 6 <i>Madd.</i> 91, 110. <i>Watkins v. Maule</i>, 1 <i>Jac.</i> 105.</p>
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BUTT, *Ex parte*.

1805.

Jan. 25th.

**T**HE prayer of this petition was to stay a bankrupt's certificate, upon the objection, that it was obtained by giving money to particular creditors.

Bankrupt's Certificate void, if obtained by money, though without his privity.

Mr. *Johnson*, in support of the petition, proposed to read farther affidavits, filed, since the petition was presented.

Whether affidavits to stay a bankrupt's certificate, filed after the Petition presented, must be confined to replying to new matter introduced by the Bankrupt, *Quære*.

Mr. *Romilly*, for the bankrupt, objected to reading those affidavits; insisting upon the rule, established by Lord *Rosslyn*, that affidavits to stay a certificate must all be filed, when the petition is presented; and that the only qualification of that rule can be by admitting affidavits in reply to something, introduced by the bankrupt.

*The Lord CHANCELLOR.*

Lord *Thurlow* left this Court with a strong inclination to struggle against certificates. Lord *Rosslyn* thought otherwise: and gave them with great facility. But, I know, afterwards out of Court his Lordship thought that wrong, and that he should examine more into the conduct of the bankrupt than had been his habit. I doubt, whether the rule ought to be laid down in such terms \* as to preclude all farther information than was given in the first instance, even with the qualification now admitted (41). But, rejecting these affidavits, and allowing this

[ \* 360 ]

(41) *Ex parte Bowes*, post, Vol. XI, 540; and see the General Order, 16th Nov. 1805, permitting affidavits in reply, post, XI, 542. *Ex parte The Bank of Scotland*, 1 Ves. & Bea. 5. 1 Rose, 375. The General Order is also in 2 Cooke's Bank. Law, 273, 8th edit.

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BUTT,  
*Ex parte.*

this certificate, I should not help the bankrupt; for, if he sought before a Judge to be discharged, the affidavits, on which he relies, would not be held a ground of discharge. On the other hand, I feel it very difficult upon attention to any principle, that has furnished this rule, to support the doctrine, that a bankrupt is not to have his certificate, if, though he would abhor such means of procuring it, some too active friend has advanced a sum of money, to obtain it: in a case perhaps, where he might have obtained it honestly by other means. But in such a case the Law is clear, (and I lament, that it is so,) that the certificate is good for nothing, if money has been given to obtain it, though without the privity of the bankrupt (42).

(42) 1 *Cooke's Bank. Law*, Mr. *Roots*, 468. *Ex parte* 465, 5th edit.; 8th edit. by *Hall*, post, Vol. XVII, 62.

1805.

Jan. 25th.

## RIDER v. KIDDER.

Purchase in the name of another, not a child or wife, a trust for the person advancing the money; unless the presumption from that circum-


stance is repelled by evidence.

Under a covenant upon marriage by the husband with the trustees, in case his wife should survive him, to pay her a sum of money, she is a creditor within the statute against fraudulent conveyances, 13 *Elix.* c. 5.

As to the jurisdiction over Stock in favour of creditors, *Quære.*

BY indentures of settlement, previous to the marriage of *John Rider* and *Catharine Gray*, dated the 7th of *August*, 1769, *John Rider* covenanted with the trustees, in case *Catharine Gray* should survive him, within 12 months next after his decease to pay her 3000*l.*, with 4 *per cent.* interest for her own use: and, in case there should be any issue, to pay to the trustees

trustees within the time aforesaid 2000*l.* with the same interest, upon trust to place it out at interest, and pay the interest to *Catharine Gray* for life; and after her decease as to the principal in trust for the child or children of the marriage.

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*John Rider* in 1797 purchased the sum of 2000*l.* consolidated 3 *per cent.* Annuities by his general agents; and gave them a Letter of Attorney to receive the dividends, having transferred the Stock into the joint names of himself and *Anne Kidder*; with whom he had an improper intercourse; and from that time to 1803 the dividends were paid by the agents to her; *Rider* generally residing in the *East Indies* till his death. He left his wife surviving him and one child by her.

The widow, having taken out administration to him, filed the bill against *Anne Kidder*; praying, that the transfer of the Stock by *Rider* into the joint names of himself and the Defendant may be declared to have been made in trust for himself: or otherwise, that it may be declared to have been voluntary and fraudulent as against his creditors; and that the Defendant may be decreed to transfer the fund to the Plaintiff as his legal personal representative, &c.

The Defendant by her answer stated, that *Rider* informed her, he had made the purchase in contemplation of leaving *England*; meaning it to be a provision for her; and that he thought it would be more secure in their joint names; as it could not be sold or transferred without his knowledge in his life; and he requested her to join in a Letter of Attorney to his agents to receive the dividends; and she received the dividends always from that time. She denied, that she prevailed upon him to make the transfer; that it was a trust for him; &c.

Mr.



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Mr. Romilly and Mr. Hart, for the Plaintiff.


It is admitted, that there was no consideration for the transfer of this Stock; which was a mere transfer into the joint names of the intestate and the Defendant; no instrument being executed. First, the Defendant must be considered a trustee for the personal representative: if not, then the transaction, as being voluntary, and intended to defeat creditors at his death, cannot stand. Where a man makes a purchase in the names of himself and another person, no consideration passing from that person, he is *prima facie* a trustee for the purchaser: the purchase being made in the name of another, probably to answer some purpose of convenience. No reason for creating a joint-tenancy appears. If he had filed a bill against her, calling for a transfer from their joint names into his own name, could she, having taken that transfer without consideration, have made any defence? It must then be considered a trust.

But, upon the other point, this case is under very peculiar circumstances. At the time of this transfer it does not appear, that he owed any debt, except one, payable after his death; and, as far as appears, this was all the property he had; which under the effect of this transaction was to remain his during his life, and to become the property of another person upon his death. If the transfer had been made, not for a person under these circumstances, but for a wife, it would have been a fraudulent settlement: *Taylor v. Jones* (43); and it would be singular, if this Defendant can stand in a better situation than a wife. It is true, your Lordship has expressed doubt upon that case; whether it comes within the Statute of *Elizabeth* (44); being a transfer of Stock, which creditors cannot take in execution. But this is  
under

(43) 2 Atk. 600.

(44) Stat. 13 Eliz. c. 5.

under different circumstances: a man, not parting with the property during his life; but, making a disposition, to take effect at his death, and so defeat his creditors. If therefore this is to be considered as intended for a provision for this Defendant, it is a provision for her in fraud of creditors. His object was to maintain that controul over her during his life, which the policy of this Court reprobates. In *Mortimer v. Davies*, a late case at the *Rolls*, a man living in this way, but not married, purchased an annuity in the name of the woman, with whom he cohabited. It appeared, the purchase-money was his; and no consideration passed from her. She insisted, that it was intended as a provision for her; but was held to be a trustee.

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Mr. *Richards* and Mr. *Phillimore*, for the Defendant.

This was a present to the Defendant; given as a permanent provision for her. She received the dividends; and his letters shew, he treated it as her property. Under those circumstances it cannot be called back. Upon the other question, there is no equity in this case. It is purely at law. To make the transaction void under the Statute of Queen *Elizabeth* there must be a creditor at the time. A subsequent creditor cannot affect it; though, if there is a prior creditor, capable of setting aside the transaction, subsequent creditors are let in; as, being void as to one creditor, it is void throughout. The authorities have gone that length (45). At the time this transaction passed no action could have been brought against *Rider* by any one: the only engagement he was under being the covenant entered into on his marriage; depending on the contingencies, that his wife should survive him, and that there should be issue of the marriage. A contingent debt was never considered within the

(45) See ante, *Lush v. Wilkinson*, Vol. V, 384, and the references, by which the contrary is now settled.

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the Statute of Queen *Elizabeth*. If the Stock had been transferred into the name of the Defendant alone, therefore it would have been good. If this is not a trust, this Court can no more give execution against Stock than a Court of law: *Dundas v. Dutens* (46). It is true, this Court is said to act *in personam*; but that is only in cases of trust. This Court cannot order the identical property to be delivered up, or transferred, except on the ground of trust, giving an interest to the person demanding it. If the Defendant is only to be considered a debtor, the demand is the subject of an action. Upon what principle can a Court of Equity relieve under the Statute of Queen *Elizabeth*, where a Court of Law cannot?

The letters of the intestate being offered in evidence by the Defendant, the Plaintiff's Counsel objected to have them read. One of those letters stated his wish, that he could do more for her; but expressed his satisfaction to know, that he leaves her independent. Another letter spoke of her 60*l.* a-year, as a permanent income, with reference to the Income Tax.

The Lord CHANCELLOR.


The trust arises by mere presumption of law upon the advancement of the money. Then the letters may be read to rebut that presumption (47). But they amount to no proof of any thing.

Mr. *Romilly*, in Reply.

The Defendant may be treated as a trustee, either by contract, or, as the transaction was fraudulent. The intention

(46) Ante, Vol. I, 196. (47) *George v. Howard*,
Nantes v. Corrock, IX, 182. 7 Pri. 646.

intention must have been either, that she should have this property for herself, or that she should be a trustee for him. A joint interest could not be intended; for the property was not so dealt with: the Defendant receiving all the dividends. In cases of this sort the presumption is a trust for the person advancing the money; and the only evidence against that is the circumstance, that his attornies received the dividends; and paid them over to her. What could be the meaning of his joining his name with her's, but to keep a control over her; that she should have it as long as he pleased. He could not mean to be a trustee for her; as he was going to the *East Indies*. In *Mortimer v. Davies* there were no circumstances. Upon the dry point alone, that the Defendant cannot produce evidence of an intention to make a provision for her, this Plaintiff is entitled; as her husband was.

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But, upon the other point, it is true, the trustees in the settlement are the legal creditors: not the Plaintiff. But she is beneficially entitled. Though there is no instance of a bill, filed upon this ground by a personal representative alone, without a creditor, that may be supported upon principle; if the estate is insolvent. The Statute of Queen *Elizabeth* reaches a debt, depending upon a contingency, as much as a debt certain. Though this debt was not payable until twelve months after the death of the husband, leaving his wife surviving, yet it was a debt from the execution of the covenant. The Plaintiff puts the case, not as a settlement void at Law, but as a provision for a criminal and adulterous intercourse. The distinction between a recompence for past, and a provision for future, cohabitation, has never been made in the instance of a married man.

The

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Whether the Court has gone farther than to restrain enforcing a security *pro turpi causâ*, and has taken the property out of possession of the party, except as to creditors, *Quære*.

The Lord CHANCELLOR.

Has there been any case upon that distinction, where the Court finding the woman in actual possession of the property has upon that ground taken it out of her hands? The distinction upon the doctrine of *præmium pudicitæ* has prevailed in the case of restraining her from enforcing a security. But I doubt, whether there is any instance of taking the property out of her hands, except as to creditors.


For the Plaintiff.

There is no case, I believe, except as to restraining her from enforcing a security in her hands. The material circumstance is, that this property was not to come absolutely under her control until after his death; as it cannot be made out, that he was originally intended to be a trustee for her.

The Lord CHANCELLOR.

It is said, first, this is a trust: if not, secondly, that the transaction is fraudulent against creditors; and that the objection upon the fraud is competent to the personal representative, as such: supposing the estate is insolvent. Upon the first point, I suspect, there is something of the nature of trust in the transaction: to what extent it is difficult to say without some farther inquiry. If the case at the *Rolls* was purely this; that *A.* bought an annuity in the name of *B.*, *A.* paying for it, and *B.* had no proof, that it was meant as a provision for her, in this Court the fact of the advancement of the purchase-money, as between these persons, standing in no relation to each other, that would meet the presumption, raises a trust in the person, vested with the interest, for the benefit of the person, who paid the money. This doctrine admits some exceptions, that were very fully discussed in the Court of *Exchequer*, in the case of a copyhold


hold estate in the West of *England*; which was bought for successive lives. The habit was to insert as feoffees the children of the purchaser. It was settled in that case, that *prima facie* the relation will give the child an interest; and perhaps that would prevail also in favour of a wife (48). But the case of a child was distinguished from that of a stranger; in which there is not that natural affection, that would beat down the presumption, arising from the advance of the money (49).

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If therefore this case depended upon the mere naked circumstance of the purchase of stock in both their names, and he had died immediately, without any dealing or transaction upon it, I should have thought, the Defendant would have been a trustee for his personal representative; as she would have been for himself. But the presumption may undoubtedly be met by circumstances of enjoyment; tending to shew, that, which *prima facie* is a trust, was intended as a gift; and, then the circumstances and the weight of each are to be examined. This case is under very peculiar circumstances. What would have been said upon the question of trust, if this lady had died first; and left a personal representative? If it was an absolute trust for her, it would make no difference as to the equitable interest, which survived. If therefore there was a trust for her from the beginning, they must contend, not that she took by mere survivorship, which is only as to the legal interest, but that, whether she survived, or not, she took the whole equitable interest. Are the circumstances of this case sufficient to

(48) *Lorimer v. Lorimer*: to go to her as the survivor:
 in *Chancery*, 11th Nov. 1822. MSS. Mr. *Beames*; who was
 Stock, purchased by a man Counsel against the wife.
 in the names of himself and
 his wife, was on his death
 held by the Vice Chancellor

(49) See the note, post,
 Vol. XV, 60, *Finch v. Finch*.

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to meet the *prima facie* presumption? Unquestionably they are not; even as they now stand; little explained, as they are; though certainly capable of explanation. It is clear, *Rider*, purchasing this fund in the names *both of himself and the Defendant, might by revoking at any time the Power of Attorney have prevented her from receiving the dividends; and if she had filed a bill, to compel him to execute a Power of Attorney, suggesting, that he was a trustee, and attempting to prove it by the receipt of the dividends, the question would have been, why was the joint Power of Attorney given to his bankers; and in what manner has she been permitted to receive the whole dividends; and very slight explanation would have proved, whether it was a gift from him from time to time, as long as the Power should be permitted to remain; or whether her receipt of the dividends flowed from an equitable interest she was to have *ab origine*. So upon such a bill after her death, if she had died, leaving him surviving, it would have been competent to him to shew by evidence, upon what footing she received the dividends. Upon the evidence, the utmost intended was to secure to her an income; and, if that only was intended, it by no means destroys the existence of trust; for if the intention was to give her an estate for life, not depending upon his will, still the capital would be his. It might turn out upon inquiry, that she had enjoyed the income from it in this sense; that it was nothing more than income of his gift from time to time; as being revocable under the Power of Attorney; and the manner, in which the banker's accounts were kept, may prove that. It will be proper therefore to direct inquiries as to all the circumstances.

The second question is very material and difficult; and it is very important to have it well settled. It is clear, Stock cannot be attached in the life of the party.
 Such

Such was the language of Lord *Thurlow* in *Dundas v. Dutens*; and also in the case of *Sir Alexander Leith*; where a bill was filed, to try, whether this Court would give execution in aid of the infirmity of the law; and it was held, there was no jurisdiction. Yet it is clear, under the bankrupt law stock is got at, and in the administration of assets. I do not know, how they get at it at law. In this Court they get at it by circuitry of reasoning. The Acts of Parliament, creating Stock, contain express clauses, declaring, that Stock cannot be bequeathed, as Stock, except by a Will, attested by two witnesses. I argued twenty years ago before Lord *Thurlow*, where there was a Will, attempting to dispose of Stock, that it could not amount to a specific legacy; the Statute requiring that attestation. Lord *Thurlow* had considerable difficulty upon that; which had a semblance of argument, aiming at the destruction of the practical doctrine of this Court. But, the acts having given the Stock to the executor, in case there should be no such disposition by Will, he held, that it could not pass by virtue of the Will; but it would pass by virtue of the Statute; and also, that what the executor took as executor must be dealt with in his hands as any other property in his hands. Of course it would be assets for general debts and legacies; and, though the Stock, as Stock, would not pass under a Will without the attestation required by the act, yet a Will, without any witness, would be a direction, how the executor was to deal with the Stock; which he took, not by the Will, but in default of a Will, attested according to the directions of the Act; and it is a singular doctrine. The question is very nice and difficult. In *Taylor v. Jones* the *Master of the Rolls* got at it: but he got at it through a doctrine, which, as reported, it is very difficult to maintain; and which seems to have surprised Lord *Thurlow* very much in *Dundas v. Dutens*. If therefore the decision was to turn upon the latter doctrine, I should

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wish to look at those authorities: but I think, the former view of the case will decide it.

* My opinion is, the Plaintiff would be a creditor under a marriage settlement, that a fraudulent conveyance would not affect.

Inquiries were directed as to all the circumstances, under which the purchase of the Stock was made, and the dividends received; whether the deceased died indebted; and whether he left any and what other personal estate (50).

(50) The Stock was afterwards ordered to be transferred. Post, *Rider v. Kidder*, Vol. XII, 202. XIII, 123.

1806.
 Feb. 1st.

REID v. SHERGOLD.

An express estate for life, with a Power to dispose by Will, does not give the absolute interest, so as to preclude the necessity of executing the Power.

An execution by Will revoked by a subsequent

conveyance upon a sale by the tenant for life, having obtained the legal estate; and that not being an execution within the intent of the Power, the estate passed under a general residuary devise against the purchaser.

JOHN GALE, being seised of copyhold estates, to him and his heirs, according to the custom of the Manor of *Isleworth*, by his Will, dated the 4th of May, 1767, gave and bequeathed the said estates, with household furniture and other articles, to *Samuel Barnesley* and *William Hargrave*, and to the survivor of them, and to the executors or administrators of such survivor; in trust for the sole use and benefit of his niece *Henrietta Maria*, the wife of *Henry Stables*; for and during the term of her natural life; and, that *Barnesley* and *Hargrave*, or the survivor, his executors, &c. do pay to his said niece for her own use notwithstanding her coverture,

ture, all the rents, issues, and profits, arising from the aforesaid premises, or suffer her to receive all such rents, arising or to arise; and after the decease of his said niece he gave all the aforesaid premises, household goods, &c. to *Barnesley* and *Hargrave*, or the survivor, &c. in trust for the sole use and benefit of *Mary Gale Stables*, daughter of his said niece, and for her maintenance; and when she should arrive at the age of twenty-one years, or immediately after the death of her mother, his Will was, that *Barnesley* and *Hargrave*, or the survivor, &c. do assign, transfer and surrender, all the aforesaid premises, and pay all the money they may happen to have in their hands, to *Mary Gale Stables*: but, if she should happen to die, before she should attain to the age of twenty-one years, his Will was, and he thereby gave all the aforesaid premises unto such person or persons, and in such proportions as his said niece by her last Will and Testament, by her duly executed, should give and dispose thereof. But, if his said niece should choose to have the aforesaid premises and household goods sold, he gave full power to *Barnesley* and *Hargrave*, with her consent, to sell and surrender; and all the money arising from such sale to put out in Government or other securities in the name of them or the survivor, and pay to his said niece for her own use all the interest arising or to arise therefrom for her own separate use, for and during her natural life; and after her decease his will was, that all the aforesaid money in Government Securities or otherwise be continued in the name of *Barnesley* and *Hargrave*, or the survivor of them, until her daughter *Mary Gale Stables* arrives at the age of twenty-one; and then after the death of her said mother do pay unto *Mary Gale Stables*, and transfer all such Stock or Securities and all money in their hands, in the same manner as if the estate had not been sold; and, in order that *Henrietta Maria Stables* may have a comfortable maintenance, he gave *Barnesley* and *Hargrave* 20l.

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a-year,

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a-year, to be paid them by his executor, but for the sole use of his said niece for and during her natural life; out of any part of his personal or freehold estate; and her receipt to be a sufficient discharge.

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The testator also gave and bequeathed to *Barnesley* and *Hargrave* 400*l.* Stock in the 3½ per cent. Annuities •1758, but for the sole use and benefit of *Mary Gale Stables*: but the interest or dividends to be from time to time paid by the trustees to his said niece, until her daughter arrives at the age of twenty-one years; then his will was, that the trustees do transfer unto *Mary Gale Stables*, if living, the said 400*l.* Stock: but, if she happen to die, before she arrives at the age of twenty-one years, that the interest be paid to his said niece during her natural life; and after her decease he gave the said 400*l.* Stock unto such person or persons as his said niece by her last Will and Testament by her duly executed shall give and dispose thereof: and for want of such Will he gave the aforesaid 400*l.* Stock to his executor after named. He gave to his nephew *William Gale* his gold watch and seal; and gave several other legacies. All the rest and residue of his estate real and personal, of what nature or kind soever, he gave and bequeathed to his said nephew *William Gale*; appointing him sole executor.

After the death of the testator *Mary Gale Stables* died under the age of twenty-one in the life of her mother. In 1769, *Hargrave* was admitted tenant; *Barnesley* attending, and declining to act in the trust. By surrender, dated the 7th of *May*, 1781, taking notice, that *Mary Gale Stables* had died under the age of twenty-one without issue, *Hargrave* by the direction and appointment of *Henrietta Maria Stables* surrendered all the said copyhold estate to the use of *Henrietta Maria Stables*, her heirs and assigns; and on the 11th of *May* she was admitted; and afterwards surrendered to the use of her Will.

By

By her Will, dated the 12th of *February*, 1786, attested by three witnesses, reciting, that by the Will of her uncle she was entitled to copyhold estates and legacies, with power to dispose thereof by her Will, she gave and devised to *Mary Spyers* all her copyhold estate, devised to her by her uncle, and surrendered to the use of her Will, as also all other her estates and effects; and appointed her sole executrix.

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At a Court Baron, held on the 27th of *April*, 1791, the testatrix surrendered the copyhold premises to the use of *Thomas Harben* and his heirs; and he was admitted; and at the same Court *Harben* surrendered the premises to the use of *Henrietta Maria Stables* to secure to her an annuity of 150*l.* during her life; which annuity was the consideration of the purchase by him from her. She died on the 25th of *March*, 1799.

The bill was filed by the residuary devisee and legatee of *William Gale* against persons claiming under *Harben* and under the devisee of Mrs. *Stables* and against a lessee; the Plaintiff insisting, that the surrender to *Harben* by *Henrietta Maria Stables* was a revocation of her Will as to the copyhold estate; and was void, except as to her life estate; and she had no right to dispose after her decease otherwise than by Will.

Mr. *Romilly*, for the Plaintiff.

In the event, that has happened, Mrs. *Stables* was entitled to this copyhold estate for life, with power to dispose of it by Will: and in default of execution of that power the estate would pass under the residuary devise. Her Will, if not revoked, would unquestionably have been a good execution of her power. But in 1791 she entered into an agreement to sell the estate in consideration of an annuity; and she surrendered accordingly. Three questions are made by the Defendants: 1st, that Mrs.

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Mrs. *Stables* took the absolute interest under the Will of her uncle: 2dly, if she took, not the absolute interest, but an estate for life only, with a power of appointment, that power was well executed by her Will; and that was not revoked by the subsequent surrender: 3dly, * that, if the surrender to *Harben* did not give him the absolute interest, yet, being a purchaser for valuable consideration, he is entitled to the assistance of the Court; and it is to be considered as if she had executed a Will in his favour. As to the first point, clearly upon the Will of *Gale* there is only an estate for life, with a power of appointment. There certainly are authorities that a devise of an estate, to be at the disposal of the devisee, gives the fee: but it has never been held, that, where a limited interest for life, with a power of disposition, has been given, the devisee takes more than an estate for life, with a power. Among many cases it is not necessary to refer to more than one, 3 *Leon.* 71, and 4 *Leon.* 41: a weaker case than this; as the particular mode of executing the power was not prescribed (51).

Upon the second point it will be contended, that the surrender had no validity; and therefore was no revocation. It did pass the legal estate: but, independent of that, it is fully settled, that all conveyances, though not effectual as conveyances, if intended to have that effect, will produce a revocation; as feoffment without livery, and bargain and sale without enrolment. The ground is, that the deviser has done what he conceived would be effectual to revoke his Will.

Upon the third question, it must be contended, that the Court will supply a defect in the execution of a power for a purchaser, as for a wife, creditors, &c.
 Without

(51) See ante, the note, Vol. II, 594. *Holmes v. Coghill*, VIII, 499, and the note, 508.

Without disputing that, this is not to supply a defect in the execution, but to supply the want of execution. This power was never executed; for it was conceived, that Mrs. *Stables* was absolutely entitled. When the power has not been executed, the Court will not substitute an execution. A Will, with a covenant not to revoke it, would not have been a good execution of this power; for it was to be executed by a revocable instrument: the intention of the testator pointing out the particular mode; which is essential. If she had attempted it by a Will, with a covenant not to revoke, that would be an execution by deed: a power, which the testator did not intend she should have.

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Mr. *Richards*, Mr. *Benyon*, and Mr. *Maddock*, for the Defendants, gave up the first question, made by the answers, that Mrs. *Stables* had the absolute interest, not merely an estate for life, with a power; and the Lord Chancellor said, the Defendant could not possibly maintain that point.

Upon the second question, the Court does not look into the precise manner, in which a power has been executed: provided the intention to execute appears; and particularly in the case of a purchaser for valuable consideration the Court will only look at the substance. Mrs. *Stables* attempted to execute her power: but the execution was defective. The case supposed is, where there has been no attempt to execute. The Court will assist the attempt. If there is a power to grant leases by deed, and a contract for a lease has been made, even that has been considered an attempt to execute the power; and the party to that contract has been considered, as a purchaser for valuable consideration, entitled to a lease, with all the covenants required by the power. That is nothing like an execution of the power; but a mere declaration of intention: yet the remainder-man is bound.

The

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The question is, whether the intention is not express, that this power should not be executed by deed or contract. In order to prevent her disposition of the estate • in her life he gives her the power to do it by Will, and not otherwise. The question is, whether I can treat this as a defective execution of a power, which it is clear upon the Will the testator never intended she should have.

For the Defendants.

If that point is against the Defendants, then upon all the circumstances there is no revocation of the Will; though, as a general proposition, a Will, disposing of copyhold estate, will be revoked by a subsequent surrender. She had the legal estate for life, for her own benefit; and the remainder, in trust, not for herself clearly, but for those, who should be entitled. Surrendering to *Harben* she could convey only the estate for life, as a beneficial interest; though her surrender passed the legal remainder certainly. The question then, which is new, is, whether, making a Will in execution of her power, and afterwards conveying the legal remainder, she revoked that Will; which could not possibly affect any interest she had. If a person, seised in fee, devises, and afterwards makes a conveyance, effectual, or not, as if by feoffment without livery, that certainly is a revocation. But, if the deviser, having an estate for life, with a distinct remainder in fee, devises the remainder, and afterwards conveys the estate for life only, that is no revocation of the devise, which is to operate on the remainder only. The estate he has at his death is the estate devised, notwithstanding the conveyance. If therefore this testatrix had not taken the remainder from the trustees, and had conveyed her estate for life, the devise of the remainder, expectant upon her estate for life, could not be affected. The conveyance,

conveyance, though affecting to pass the inheritance, in truth passes only the estate for life; and therefore cannot operate as a revocation of a Will, which was to operate only upon the remainder, expectant upon her estate for life. The argument upon the intention is done away by the late cases of revocation (52). The effect is produced by displacing the estate. As to the inheritance she was only a trustee, not for herself, or any one, claiming under her bounty, or taking from her by privity of interest; but for the persons she should point out by the execution of the power as the objects of the testator's bounty. By the surrender she acquires no more than she had before; and was afterwards as much a trustee as *Hargrave*, who surrendered.

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The residuary disposition is exclusive of the copyhold estate; as to which there is no provision in default of appointment; as there is with reference to the 400*l.* stock. At least the heir ought to be before the Court to maintain that point.

Mr. *Romilly*, in reply, was stopped by the Court.

The Lord CHANCELLOR.

This in effect is a devise by *Gale* of these copyhold premises to the separate use of his niece. The variation of expression cannot raise a question, whether the legal estate was to be in her or the trustees; for the purpose of devoting the rents and profits to her separate use would require it to be in them. The 20*l.* a-year also was to be for her separate use. The effect of the Will is, that, if both the trustees had accepted the trust, the copyhold estate would have passed to the sole and separate

(52) See ante, *Harmood* v. *Oglander*, Vol. VI, 199. VI, 201. VIII, 106, and the references in the notes, II, 437.

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rate use of the niece for life; with remainder in trust for her daughter absolutely, if she should attain the age of 21; and, if she should die under that age, her mother, surviving, would be tenant for life in equity of the estate, with such an interest or authority as the law would give her to dispose of the inheritance. He also intended to give a power, in the mode, in which it is expressed, in certain circumstances to sell: but that power is expressly given to the trustees, and to make sale with her consent. A due execution of that power therefore required the sale to be made by them, authorised by her consent. As to the 400*l.* stock the ultimate trust is for such person as his niece should by her Will appoint, if her daughter should die under the age of 21. There is this difference; that the daughter, attaining that age in the life of the mother, would take that absolutely: if she died under that age, in that event the personal property is expressly given to the mother for life; with an interest or authority to dispose of it by Will. The last clause without any question gives every interest in the freehold and personal estate, which either is not expressly given before, or, which by events, defeating express disposition, should happen not to be disposed of; and the single question upon that clause is, whether, regard being had to the context, he meant to dispose, in case his niece under the power should have made no disposition, or her daughter should not live to take the absolute interest in the copyhold estate, which in such an event would not be disposed of, or in the money, arising from the sale; and the Defendants can go no farther than an implication, that the testator did not intend the interest in the copyhold estate; as, supposing the case of default of appointment of the 400*l.* stock, he expressly makes a disposition as to that. But, if that express disposition had not been made, that must have passed to the residuary legatee of necessity. The question is only, whether copyhold estate is well described by the expression

pression "*real estate*;" and there is no doubt, he meant to pass whatever interest was undisposed of in the copyhold estate.

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The next point is, whether by the true effect of the Will, the niece's daughter dying under 21, the niece herself had a seisin to her and her heirs in equity, if not at law, in the copyhold estate. It is perfectly clear, upon the authorities, she had no such interest; and, that, attending to the scope and object of the testator, such interest was not intended; and not intended for her own sake. It is well settled in the case, alluded to by Mr. Romilly, and many others, that, where there is an express limitation for life, with a power to dispose by Will, the interest is equivalent only to an estate for life; and the power is to be executed, *prima facie* at least, by Will. If the party dies, the interest ceases with the life; and no one can take by transmission of interest from that person; though they might take by the power, if executed. In this case the meaning of the testator was this. He was providing anxiously in every part of his Will, that his niece should have the power of receiving the rents and profits from time to time for her separate use; tying up her hands from indulging her inclination against herself. He studiously confines her power of giving the premises to a power of giving by Will, in its nature revocable in every period of life: the power given in that way to protect her against her own act. This is the more strong, as the bequest of the 20*l.* a-year and the dividends of the 400*l.* stock are expressly given for the niece for life; and after her death nothing was to take effect in her or any one but by her authority. She had nothing therefore in point of interest but for her life. In point of authority she might by her Will have made a disposition, to take effect after her death,

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It is then said, if the sale is not good, as a sale, it shall be taken to be, either something in the nature of a contract, with reference to which a purchaser for a valuable consideration is to be aided; or an attempt, an act done, in or towards the execution; in respect of which this Court will aid him. I do not stay to determine, whether it appears, that she meant to execute the power, or, conceiving, and I am clearly of opinion, misconceiving, that she had the absolute interest to convey, she meant to convey that interest; and that this surrender should not be any thing done in execution of her power to dispose by Will. The testator did not mean, that she should so execute her power. He intended, that she should give by Will, or not at all; and it is impossible to hold, that the execution of an instrument, or deed, which, if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of her death, can be considered in equity an attempt in or towards the execution of the power. That therefore will not do,

The last question is, whether the Will is revoked? She meant to give all she could in the copyhold estate. To prove, that she has not revoked that, the exact state of the title has been examined. With reference to that, the legal interest is given to two trustees. One would not accept the trust. He attended at the Court; and refused to accept it; and the other was admitted to the whole interest. The effect of that is, that he was owner of the entire legal estate, in trust for the niece, for her separate use for life, for her daughter, surviving her, if she should attain 21; and if she died under that age; for the residuary devisee. The trustee afterwards surrenders to her the whole he could by that surrender pass to her. The effect of that is, that she became entitled to the legal estate, upon the same trusts, after her

her death at least, for all the other persons; as he was. Then she makes a Will; observing, that she has an interest and an authority; and stating her intention to be, that this estate after her death, shall go by virtue of her power. Afterwards, having the whole legal estate, she surrenders the whole to the use of a person, who according to the meaning expressed is to take an interest, not only inconsistent with, but directly contrary to, the intention expressed. The question is, whether that is not an effectual instrument to denote an intention, that the Will shall not stand. Under the circumstances, I think, that surrender was a revocation. The consequence is, that the person, who has the legal estate, is a trustee for the person, who would have taken, if that Will had not been made.

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Upon the whole, therefore, this purchase, and the lease made under it, cannot stand. Another objection to the purchase is, that, the consideration being an annuity, it was an Act, which could not, either in Law or Equity be said to be within the intention of that power.

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THE object of this petition, by a bankrupt, was to have the Commission of Bankruptcy against him superseded, and a sale of his estate under it set aside, as having been improperly and fraudulently conducted, and the estate sold at an under-value. The estate was sold by auction in the county of *Kent*; where the Commission issued. General *Harris* proposing to purchase the estate

The Solicitor to a Commission of Bankruptcy cannot purchase under it either for himself or another.

for A Commissioner of Bankruptcy cannot purchase under the Commission either for himself or another.

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for the residence of his son-in-law, in whose family it had formerly been, applied to *Tappenden*, who was the solicitor to the Commission; and who also acted as attorney, and as a banker, for General *Harris*. After some inquiries concerning the estate, General *Harris* desired *Tappenden* to bid for him. *Tappenden* answering, that it would not be proper for him to bid, as he was Solicitor to the Commission, General *Harris* desired him to employ some one to bid; to which *Tappenden* consented; and accordingly employed a person, named *Blount*, to bid for General *Harris*. In that conversation General *Harris* expressed his opinion, that the estate was not worth more than 10,000*l.*, or 10,000 guineas; and he gave authority to go to 10,500*l.*; and if any one should bid 10*l.* upon that sum, to advance 10*l.* more upon that bidding. *Blount* attended accordingly; but, being obliged to retire before the conclusion of the sale, *Tappenden* desired *Shepherd*, who was one of the Commissioners, to bid for General *Harris*; giving *Shepherd* the same instructions, that *Blount* had received. *Shepherd* bid accordingly, and was declared the purchaser at the sum of 10,070*l.* The affidavit of the bankrupt represented the value to be 15,000*l.*

The case was argued by Mr. *Romilly* and Mr. *Wyatt*, in support of the petition; Mr. *Alexander* and Mr. *Whishaw*, for the purchaser.

The Lord CHANCELLOR.

The question upon this petition is, whether the sale to General *Harris* ought to be declared void. It is clear, this not being a purchase by a person, whose conduct under the Commission falls to be controlled in bankruptcy, the proceeding ought to be by bill. The parties suggest, that they are willing to be bound by the judgment in bankruptcy: but, I doubt, whether I ought to accept that offer: the case involving considerations of great nicety and great importance.

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By the conversation with General *Harris*, *Tappenden* acquired the information, that there was an individual who would give 10,520*l.* for the estate. By that knowledge he got into an embarrassed situation. As solicitor to the assignees, his duty was to make the most of the estate: as a person, who had been the private attorney of General *Harris*, after permitting General *Harris* to talk with him upon the subject, he was in a situation of confidence with respect to him. Upon the circumstances of the sale, the first way of putting it is, that *Shepherd*, being a Commissioner, could not buy, either as principal, or as representing any other person. Next, it may be said, it is clear, *Tappenden*, being the solicitor, could not buy for his own benefit; next, that he could not for a third person; all the same mischief attending the latter case, as if he was buying for himself. Then it may be said, it makes no difference, 1st, that he is not the buyer: 2dly, that he was not the bidder for the buyer; but that upon principle, if he does nothing but the naked fact, employing another to bid, telling that person, what his employer would give, and that he is to get it as cheap as he can, which is implied in the employment, it cannot be supported; and *Shepherd*, if he was not a Commissioner, is under the same circumstances, as agent. As to the case of the Commissioner, the ground, upon which the assignee and solicitor are not permitted to purchase, is, that they are to collect for the benefit of the general creditors and the bankrupt, and all the information, that can enable them to sell under such circumstances, and with such manifestation of the worth, as will probably produce the highest bidder; and the consequence of permitting them to bid would be, applying that information to their own private benefit. The question, with reference to the Commissioner, doing no act whatsoever but bidding, is, whether he is under the same disability.

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The old Statute of *Henry VIII.* (53) put the affairs of the bankrupt under the *Lord Chancellor* and other great officers, without the assistance of either Commissioners or assignees. The Statute of *Elizabeth* (54) added Commissioners; and the bankrupt laws for some time did not suppose the existence of assignees: but the Commissioners were to dispose of the person and property of the bankrupt; and it is clear, while the Commissioners stood in that character, they could not purchase. In a subsequent period the Commissioners were expressly directed and compelled to exercise their power, by vesting all the property in assignees, who become the trustees, having the power and the trust to sell; and I do not find, that in bringing the property to sale, or in making sale of it, the Commissioners have either powers or duties, subsequent to those Acts of Parliament. Then does the mere circumstance, that they are judges in the affairs of the bankruptcy, operate to place them in a situation, throwing round them the disability, under which trustees are placed? I have great hesitation in saying, it does. It is scarcely possible, that in the actual dealing upon a Commission the Commissioner should not have acquired from actual interposition and transaction in the bankruptcy, not from the mere circumstance of being Commissioner, what would occasion disability, particularly in the country: but it would be very strong to decide in a case of property of considerable value, without the possibility of review, that the mere circumstance of being Commissioner disables a man bidding honestly.

As to the other part of the case, laying aside the character of Commissioner, and considering the individual

(53) Stat. 34 & 35 *Hen. VIII.* c. 4. (54) Stat. 13 *Elix.* c. 7.

vidual as a mere agent, the principle, that the Solicitor cannot buy is extremely clear (55). Perhaps he is, upon principle, the individual of all others disabled; for as to the title, the nature and value of the property, his duty is not to bring it to sale, until all information has been acquired by him for the benefit of the assignees, under circumstances likely to make it yield its utmost value. If he was permitted to inform himself of mines, or local advantages, without being bound to communicate them, no Court could detect the with-holding that information, which would frequently be with-held. This case cannot be decided against the purchaser, unless upon this dry ground; that in the principle, creating the disability of the Solicitor, there is something, that will reach any person, whom he employs to bid, even if the facts demonstrate, that he does no more than say, there is a person, who will give a particular sum, with a direction to bid to that sum; and it is implied, that the person employed is to get it for as little as he can. The ground is, that, though in the particular case there may be the most satisfactory evidence, that the transaction amounts to no more than that, the general interests of justice require, that the Solicitor is not to be permitted to buy for himself, or for another; as in several cases the powers of the Court would not be equal to protect it against deception, from the impossibility of knowing the truth in every case. That in truth is the principle, on which Courts of Equity have held, that trustees shall not buy (56). I mention it, as Lord Rosslyn said more than once, that, to affect the sale, the trustee must make an advantage. That is not my opinion. The principle is deeper: viz. that, if a trustee can buy in an honest case, he may in a case, having that

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Principle of the rule, upon which purchases by trustees of the trust property are set aside.

(55) *Ante, Ex parte James*, Vol. VIII, 337, and the references. *cotpick*, Vol. IX, 234. *Whitchote v. Lawrence*, III, 740, and the note, 752.

(56) See *ante, Coles v. Tre-*

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that appearance; but which from the infirmity of human testimony may be grossly otherwise; and I cannot otherwise account for the case, where the trustee, who applied for a renewal of a lease for an infant, which the lessor refused to grant, if the infant was to have any interest, nevertheless, did renew; and the Court said, he should throw back the lease to the lessor; for in no case should he purchase for his own benefit.

The point I wish to be agitated in this case is, 1st, regard being had to the nature of the office and duty of Commissioners, and, 2dly, to the principle I have stated, could this transaction stand, if a bill was filed?

Feb. 11th.

The case stood over, that farther affidavits might be made by General *Harris* and *Tappenden*; which were made accordingly: representing, that the offer of General *Harris* was voluntary.

Mr. *Romilly* and Mr. *Wyatt*, in support of the Petition.

No improper conduct in the purchaser is suggested: but the general principle, upon which the Court has acted, will not permit him to retain an estate, bought under such circumstances, that it cannot be represented as having produced the fair value. The disappointment of an innocent purchaser cannot be set against the benefit to society from acting upon the general rule. The investigation into the execution of this Commission of Bankruptcy has now established, that this sale ought not to have taken place; that this Commission ought not to have issued; though there is no legal objection to its appearing to have been taken out merely for the purpose

pose of oppressing an individual. There are two grounds, upon which this sale cannot stand: 1st, that the person, who bid, and to whom the estate was knocked down, was a person employed by the Solicitor to the Commission: 2dly, that person was one of the Commissioners. It is clearly established, that the Solicitor cannot buy either for himself or for any other person: first, on account of his advantage over every other person; the information he has, the benefit of which ought to be given to his employer: 2dly, as his bidding may prejudice the sale; which was the only ground in *Twining v. Morrice* (57). The employment in this instance was, not merely sending a message, as it is represented, but a direction to the Solicitor to employ another person as agent, to select some proper person, in whom he had confidence. Suppose, the person selected by the Solicitor, had exceeded his authority, and grossly misconducted himself; by which a considerable loss had been sustained by the purchaser: *Tappenden* would have been answerable to him in an action, as agent to him, though not in person, by another. If *Shepherd* had declared at the sale, that he was bidding for *Tappenden*, the effect would have been precisely the same, as if *Tappenden* had bid in person. If this is permitted, your Lordship will, in many instances, have Solicitors bidding, not in person, but by another; and that bidding not for the Solicitor himself, but a third person. If this Court is to go into these minute inquiries, to see, who is to be the ultimate purchaser, the general rule, that the Solicitor cannot buy, either for himself or another, will be constantly eluded.

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The next objection is, that the agent was a Commissioner. Before assignees were appointed, by the Statute

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tute of *Geo. II.* (58), the Commissioners were the persons to sell, according to the Statute of *Elisabeth*. From that time the duty of the Commissioners was different certainly: but still it was their duty, as far as was in their power, to make the property as productive as might be, to stimulate the assignees, for the benefit of the creditors and the bankrupt. They do not discharge their duty merely by deciding upon what is brought before them. They still continue trustees for the benefit of the creditors; which is evident from their oath under the Statute of *Geo. II.* (59). If a Commissioner receives information as to the property, not judicially, he is bound to call a meeting, if no one else will. Can a Commissioner, bound to execute the several powers and trusts committed to him, purchase, as in this instance, for 10,070*l.*, though informed, that there is a person who will give 10,520*l.*? Could he consistently with his oath purchase for himself, conscious, that he would have given much more; for if he can bid for another, he may for himself? He comes to the sale with advantage. He necessarily, in his office of Commissioner, has made previous inquiry, and obtained information. Upon the last examination of the bankrupt this Commissioner was informed, this estate was worth 15,000*l.* He places himself in a situation, in which he must contend against a person, for whom his duty requires him to contend; in which he has an interest to advance at the expence of all the creditors. The knowledge, to be acquired as to the value, is of a species, which it depends upon the Commissioner to make more or less particular and full; and his examination may be regulated with a view to advance the particular interest to become a purchaser. In this particular case the two grounds of objection are not to be distinguished; for, if the circumstances

(58) Stat. 5 *Geo. II.*, c. 30.

(59) Stat. 5 *Geo. II.*, c. 30.

cumstances had been known at the sale, that the bidder was employed by the Solicitor under the Commission, and was himself a Commissioner, who had all the information, it cannot be imagined, that the sale would not have been greatly affected.

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Mr. *Alexander* and Mr. *Whishaw*, for the Purchaser.

The state of the facts upon all the affidavits is, that General *Harris* went to *Tappenden*, as the person referred to by the advertisement of an estate, to be put up to sale; that the conversation was confined to inquiries respecting that estate; and General *Harris* upon the result of those inquiries, having made up his mind, gave authority to bid to the extent of 10,520*l.* The wisdom of the rule established as to trustees must be acknowledged: but it is dangerous to extend that rule by subtlety to cases, not within the mischief. A broad line of distinction is necessary. The objection to the Commissioner before the Statute of *Geo. II.* was, that he was the person to sell; and in all periods the rule has been, that the same person cannot sell and buy. But from the date of the alteration, produced by that Act, the Commissioners have had no power to direct the sale. Their powers are to receiving proof of debts, examining, and sending upon the information of the assignees for persons, suspected of having property of the bankrupt. The assignees are to call upon the creditors, not the Commissioners, to direct a sale. What is their trust? Their duty is to produce a disclosure of the bankrupt's estate. They receive no secret information. Every creditor may put questions. They have no information, such as was obtained in *Fox v. Mackreth* (60). The sense of the word "trust," in the oath, is that, in which your Lordship, and every Judge,

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Judge, are trustees. If the situation of a Judge creates the incapacity, where is it to stop? Does it extend to the Lords, and prevent a Peer from buying? If this is to be pushed to these extreme cases, the affairs of mankind cannot proceed. No duty of the Commissioner required him to use accidental information to the prejudice of those, who trusted him. There is an impropriety in his taking upon him the character of an agent.

As to the Solicitor, what he has done cannot be represented as agency. An action could not be maintained against him for misconduct by *Shepherd*. *Tappenden* refused to act as agent. Can a single circumstance, that the Solicitor was the person to say, who should bid 10*l.* more, affect the transaction, so, as to avoid the sale? Besides General *Harris*, there was only one real bidder, who went to 10,060*l.*, *Shepherd* having first bid 10,010*l.* The effect therefore of the transaction, represented as fraudulent, has been a higher price than would otherwise have been obtained; for, if this offer had not been made on the part of General *Harris*, the estate would have been fairly sold for less. If *Tappenden* had communicated the information he received by accident from General *Harris*, it would have been gross misconduct. His communication to *Shepherd* was merely in the nature of a message. The object, for which the general rule was established, is to reach communications with the vendor's solicitor, from their nature secret; and which will always be concealed, where fraud is intended. If that was the object in this case, *Tappenden's* appearance in the transaction was not necessary. The consequence of such strictness attaching upon the most minute interference, will be, that the rule will reach an honest case, where the communication has been made by accident; and cases, the real object of its operation, will escape.

Mr.

Mr. *Romilly*, in Reply.

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These cases must be decided upon a general rule, not upon particular circumstances. The exception must be stated in plain and clear terms. The general rule clearly reaches this transaction; the effect of which is, that *Tappenden* was intrusted to make choice of a proper person to buy this estate. "Employ" is the word used. The whole responsibility was upon him. *Shepherd* did not know, for whom he was bidding; and his name, not that of General *Harris*, was put down as the purchaser. The answer to the argument, that there was but one other real bidder, is, that it was impossible to know, who would have bid, if this person had not appeared. The mischief is the same, as to the Commissioner purchasing, whether for himself or another. Suppose, this estate had been formerly in the family of *Shepherd*, and he had from the beginning a view to the purchase: would that have had no influence? There was much dispute before the Commissioners, whether this bankruptcy could be sustained, upon the petitioning creditor's debt. The bankrupt wrote repeated letters to the Commissioners: stating, that enough had been collected to pay his debts; and entreating them to call a meeting, to compel the assignees to make a dividend. Can it be represented, that the Commissioners have nothing to do with the sale? Is it not clear, on the contrary, that they compel a sale, by refusing to call upon the assignees to make a dividend. Though the last examination of the bankrupt is public, there may be private examinations. The duty of the Commissioners even now requires them to do the utmost they can for the benefit of the estate. Admitting, it would have been dishonourable in *Tappenden* to have betrayed the confidence, placed in him by General *Harris*, he placed himself in a situation, compelling him to act dishonourably to the one or the other. I do not conceive, the *Lord Chancellor* could be

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be permitted to purchase an estate he ordered to be sold. This question upon a purchase by a Commissioner has never before been agitated; and it is impossible to be certain, that all, or the strongest, cases of mischief, that may be apprehended, have been stated; and what is the advantage? Merely bringing three more competitors to the sale.

The Lord CHANCELLOR.

Having formed an opinion upon this case, I shall not delay my judgment; being perfectly satisfied, I cannot give myself any effectual assistance towards a better opinion. The circumstance, last mentioned, that this is the first time it was ever contended, that a Commissioner could buy an estate under the bankruptcy, by no means proves, that Commissioners may not have purchased in a great variety of instances: nor does the circumstance, that this has not occurred in *London*, prove any thing as to the practice; for I do not remember in an experience of 25 years, a single complaint of any such nature, with reference to the Commissioners in *London*, that is so frequent in the country; tending to render Commissions of Bankruptcy, executed in the country; a great national mischief. I have thought anxiously upon this case; believing, that such purchases are frequently made in the country; and therefore my determination may have an influence beyond the particular case; and I state this, first, as it has imposed upon me the duty of giving great consideration to it; next, in order to observe, that I decide this case upon petition at the instance of the parties; and if in any other case the principle shall be thought such as not to support the decision, I shall have no disinclination to permit it to be discussed in a regular suit. For this reason I intimated a wish to hear all the particulars of the conversation between General *Harris* and *Tappenden*: not
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under a notion, that it would affect the general reasoning; which proceeds upon general principles; but, as they might be of such a nature as to make it unnecessary to decide upon the application of those general principles.

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I wish to be distinctly understood, that my judgment, that General *Harris* cannot be permitted to hold this estate, but must give it up upon terms, goes upon a principle, that does not affect his honour, integrity or reputation. It was first, but hardly, contended, and it is almost impossible to contend, that the Solicitor may buy for himself: 2dly, that a Commissioner may: lastly, that, if the Solicitor cannot bid for himself, he may for another person; that the Commissioner may bid for another person; that, if the Solicitor cannot bid in person, he may employ a third person; and that person may be a Commissioner. If the Solicitor cannot employ a Commissioner, it is unnecessary to discuss, whether he could employ any other person, unconnected with the bankruptcy.

It is now settled, and is my opinion, that it is not necessary, in order to undo a sale to a trustee, to shew, that he has made any advantage in the article of the purchase. Lord *Hardwicke* in *Whelpdale v. Cookson* (61) intimated an opinion, that a trustee might buy at a sale by auction. I do not take that to be the law at this day. The ground is, that his duty requires him, while he remains in that situation, to carry to the sale, even at the expence of the *Cestui que Trust*, all the information, that is necessary to enable him to bring the estate to sale as advantageously for the *Cestui que Trust*, as if he were selling

Not necessary, to undo a sale to a trustee of the trust property, to shew, he has made an advantage.

Ground of the rule against such purchases; unless the character of trustee is previously shaken off,

(61) 1 *Ves. D.* Stated from Vol. V, 682, in *Campbell v. the Register's Book*, ante, *Walker*. See the note.

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selling that estate, his own, for his own benefit. If that be the principle, with reference to the duty, a Court of Equity supposes to be imposed upon him, the inevitable consequence is, that, until by contract he shall do, what all the cases admit he may, but what it may be difficult to determine he has done effectually, shake off the character of trustee, and put himself in circumstances, in which he shall be no longer the person intrusted to sell, he shall not buy for himself. Why? The reason is, that it would not be safe, with reference to the administration of justice in the general affairs of trust, that a trustee should be permitted to purchase; for human infirmity will in very few instances permit a man to exert against himself that providence, which a vendor ought to exert, in order to sell to the best advantage; and which a purchaser is at liberty to exert for himself, in order to purchase at the lowest price.

Instances in  
 support of the  
 Rule against  
 purchases of  
 trust property  
 by the trustee.

Many instances may be put. A man, employed to sell, may in the investigation, undertaken under the obligation of his duty as trustee, have learnt, that the value of the estate consists of a mine: all the rest of the world may be ignorant of that circumstance; and he may buy without communicating it; and it will rest entirely upon his honour and integrity, whether this Court can get a discovery of the fact, that he acquired that knowledge before the sale; and never communicated it: his duty requiring him to invite purchasers. In *Fox v. Mackreth* a circumstance of that nature occurred. The principle went quite beyond and aside the ground, upon which the Counsel in the House of Lords contended for an issue, whether a fair price was given in the first instance. I believe, it was: that is, as good a price, as, according to what was then known, could be obtained. But the purchaser had received his information as to the value from a surveyor, employed at the expence of the trust.

In

In the judgment of this Court and the House of Lords, certainly Lord *Thurlow* having doubt, to whose doubt the utmost respect is due, *Mackreth* had not shaken off the character of trustee; but remained a trustee, after he sold to himself; and the second sale was in equity to be considered as made, not by the purchaser, but by the trustee, buying from himself; and therefore, though the advantage was righteously obtained, it was obtained for the *Cestui que Trust*. The principle is unalterably laid in the prior decisions; especially in that, where it was held, that, to protect the purity of transactions between trustee and *Cestui que Trust*, a trustee should not take for his own benefit even property, which the owner refused to sell to the *Cestui que Trust*. That was a church lease. The trustee applied for a renewal; and the lessor declared, he would not renew for the benefit of the infant *Cestui que Trust*. The trustee then took it, and rightly in point of moral honesty, for his own benefit: but this Court said, it has so little power of obtaining a complete discovery in all cases, that the property should be thrown back to the lessor, rather than the trustee should have it.

1805.

*BENNETT,*  
*Ex parte.*

With reference to assignees under a Commission of bankruptcy (62), I have repeatedly thought upon this subject. The firmness, with which I have acted upon it in bankruptcy, has brought into difficulty persons, who did not suppose, they were liable to it. I have not the least doubt, that assignees cannot purchase for themselves; and I think, if the rule can be applied to any class of trustees, it applies with more force to them than to any other description; for there are in other cases many *Cestuis que Trust* much more able to protect themselves

The Rule  
against pur-  
chases of  
trust property  
by the trustee  
applies with  
more force to  
assignees in  
bankruptcy.

(62) See *Ex parte Lacey*, ante, Vol. VI, 625, and the references.

1805.

BENNETT,  
*Ex parte.*

than the trustees: but that is not so with regard to the bankrupt or the creditors. There is more temptation to let the assignee wrong them than to disturb him in the enjoyment of the fruit of his misconduct. As to the Solicitor under the Commission, there is no principle, applying to the assignee, that does not apply to the Solicitor. He is the man of business of the assignee: his agent in the sale: in a stricter sense the vendor. He is the person to collect particulars, form conditions, advise as to the price, not an *upset price* (63), as auctions are conducted in *Scotland*; but a price, under which it is not to go. Under such circumstances the safety of mankind requires the Court to act upon the general principle. It is clear therefore, that the Solicitor cannot buy for himself.

Next, can a Commissioner buy for himself? Consider, what he is: what are his duties, his obligations: as they respect the bankrupt, the assignees, the creditors, and considerations of public duty. Originally there could have been no doubt upon this point: the Commissioners formerly having given to and imposed upon them all the authority and the duty of assignees at this day. Probably the business in bankruptcy grew too burthensome to rest so. Accordingly assignees were created by the appointment of the Legislature. How far that has stripped the Commissioners of those authorities, and relieved them from those duties, remains to be determined upon the Acts of Parliament, and the manner of the appointment of assignees, the duties of the assignees towards the Commissioners, and the duties the Commissioners undertake to enforce against the assignees. It is fairly put; but I do not go upon the situation of the Commissioner

(63) See *M'Kenzie's Case*, *ings Company*), ante, Vol. VI,  
(*M'Kenzie v. The York Build-* 630, n.

missioner in the first step, the adjudication of bankruptcy, if he can indulge any views of private interest. But I consider the nature of his oath. I respect their ordinary duty: the duty upon them occasionally to inform the *Chancellor* of the frauds and miscarriages in bankruptcy. I respect even the form of the assignment they make; out of which may be inferred, what are the duties both of the Commissioners and assignees. The form of the assignment is not very recent: but, whether it is to be understood as prescribed by the authority of the Legislature or of this Court, the reasoning is equally just. Upon the assignment the Commissioners take from the assignees to themselves a covenant with all convenient speed to use their utmost endeavours to recover and get in the estate; and to dispose of it for the most money, and to account; with a great variety of other covenants. The question would be very singular, to be agitated between the Commissioner and assignee in these cases; to ascertain, whether there was a breach of this covenant; whether the assignee had sold for the best price, and with all convenient speed: the estate being sold to the Commissioner. Does not the duty of the Commissioner require him, at the instigation of the creditors, or even without it, to cast his view upon this most substantial question, whether the period is come, at which according to the Acts of Parliament the assignees ought to have collected the effects, and to make a dividend, and payment of the surplus? That is a duty, the due execution of which cannot be hoped, if the Commissioners are to involve themselves in private pecuniary views and interests, with reference to the property. If for instance the Commissioners, as is usual, take conveyances, the payment to be at a future day; are they to blame the assignees for not having sued the Commissioners for the money, as purchasers? I believe, Commissioners in *London* would do nothing of

1805.

BENNETT,

*Ex parte.*

1805.

BENNETT,  
*Ex parte.*

of this sort: but I know, upon many Commissions in the country nothing is intended by Commissioners, assignees, and solicitor, but private advantage. It is therefore impossible to permit a Commissioner to purchase.

If then a Commissioner cannot purchase for his own benefit, upon the circumstances of this particular case, and admitting General *Harris* to be free from all blame, can the Solicitor employ the Commissioner to buy for a person, unknown at the time of the sale: his name not declared, until the sale was over. Take it, that this estate was properly surveyed, advertised, &c. which is not agreed; that the object was to get the estate back into a family, in which it had been formerly, and that the bankrupt's valuation, at 15,550*l.*, is under the real value. The habitual, and almost constant course, is, that the bankrupt gives an account generally of his affairs, what he has left, and all the circumstances. General *Harris* applies to *Tappenden*; who appears to have been his man of business. It is very probable, the conversation of persons, so connected, might slip into disclosures, which the delicacy, resulting from a sense of duty, would not permit. It is not necessary to consider this case, as if that had happened: the affidavits stating, that no inquiry was made, or information given, more than in the ordinary case a man, referred to for particulars, would give. It must be remembered, that General *Harris* is to be considered as giving something of *pretium affectionis*. *Tappenden's* idea, when desired by General *Harris* to bid for him, was, not that the Solicitor could not bid, as he could not purchase; but, that it would have a tendency to chill the sale. Lord *Kenyon* certainly in *Twining v. Morrice* would not go the length I am going: but there is nothing intermediate in this case, of a bankrupt; not having the means of interposing himself in that state, upon which the Court might take the intermediate

mediate course, that was followed in that instance: that is, permit an action. But, if I had decided that case, I should have gone farther; if I had gone so far. In that case relief was prayed against *Blake* on this ground; that, if the estate was to be considered well sold, *Blake*, who had very honestly interposed as a bidder for the vendor, had unduly in law placed himself in that situation; and, if the contract bound the vendor, it was by *Blake's* undue conduct; and therefore he ought to make up the difference. But Lord *Kenyon* was of opinion, that, *Blake* having been the solicitor for the vendors, the circumstance of his bidding had a necessary tendency to make others believe, there were puffers; which had a necessary tendency to restrain the biddings: therefore the sale was chilled; and it was unfit to say, the vendor should be bound to execute; even for an innocent vendee. But the Court ought first to have decided, whether there could be puffers; a point upon which there has been so much dispute (64). Then if the principle be, that the Solicitor cannot buy for his own benefit, I agree, where he buys for another, the temptation to act wrong is less: yet, if he could not use the information he has for his own benefit, it is too delicate to hold, that the temptation to misuse that information for another person is so much weaker, that he should be at liberty to bid for another; and so he might bid for his son, his relation, or his employer. That distinction is too thin to form a safe rule of justice.

1805.  
BENNETT,  
Ex parte.

The particular circumstances of this case might raise questions between the parties to the transaction; upon the point, whether in strict reasoning *Shepherd* was to be considered as employed by General *Harris*. General *Harris* having required *Tappenden* to employ a person to bid

(64) See *Conolly v. Parsons*, ante, Vol. III, 625, n.

1803.

BENNETT,  
Ex parte.



bid for him, if *Tappenden* delivered that order in such a way, that the purchase was made upon other terms than General *Harris* intended: if, for instance, *Shepherd* had bid more than he was authorized, he must have kept the estate himself: if he had purchased upon the terms, directed by *Tappenden*, but different from those authorized by General *Harris*, he might have refused; and *Shepherd* must have looked to *Tappenden* as the purchaser. But without entering into such considerations, it is not necessary, in order to affect the sale, to lay a ground in any particular circumstances of conduct, forming part of the case. Upon the general rule both the Solicitor and the Commissioner have duties imposed upon them, that prevent their buying for themselves; and if that is the general rule, it follows of necessity, that neither of them can be permitted to buy for a third person; for the Court can with as little effect examine, whether that was done by making an undue use of the information, received in the course of their duty, in the one case as in the other. No court of justice could institute investigation to that point effectually in all cases; and therefore the safest rule is, that a transaction, which under circumstances should not be permitted, shall not take effect, upon the general principle; as, if ever permitted, the inquiry into the truth of the circumstances may fail in a great proportion of cases.

Upon these principles therefore this sale cannot stand. With respect to the terms, upon which it is to be set aside, I cannot order a reconveyance forthwith upon immediate payment of the money; for it is the bankrupt's estate. The proper order will be, that the expence of the repairs and improvements, that have been made, not only substantial and lasting, but such as have a tendency to bring the estate to a better sale, shall be added to the purchase-money 10,070*l.*; and the estate shall

shall be put up at the accumulated sum. On the other hand, there must be an allowance for acts, that deteriorate the value of an estate. There must also be another term, as in a former instance; that the person, who is to be delivered from the situation of purchaser, shall be speedily delivered. Therefore the sale shall take place, if the money is paid in two months: if not, my Order is to have no effect.

1805.

BENNETT,  
*Ex parte.*

WELLS *v.* WOOD.

1805.

Feb. 7th.

A MOTION was made by the Defendant for liberty to file a supplemental answer; upon an affidavit, stating only, that from certain circumstances, which had since occurred to the Defendant, he was satisfied, he ought to have admitted a fact, that he had denied.

The practice formerly was to permit the amendment of an Answer in case of mistake: now a supplemental Answer is put in.

Mr. Richards, Mr. Romilly, and Mr. Trower, in support of the Motion, observed, that the habit in Lord Thurlow's time was to have the answer taken off the file, in case of any mistake; which had given way to the present practice of filing a supplemental answer; and that since the alteration the rule is not so strict.

The affidavit must state, that the Defendant, when he put in his Answer, did not know the circumstances, upon which he applies, or any other circumstances, upon which he ought to have stated the fact otherwise.

Mr. Piggott and Mr. Hart, for the Plaintiff, resisted the Motion; insisting, that negligence was no ground; that it could not be attributed to mistake; this fact occurring in three or four places in the answer; and the conclusion was, that the Defendant wished to alter his answer from an apprehension, that the fact could be proved.

*The Lord* CHANCELLOR.

A Defendant, making this application, must make out such a case, that it shall appear due to general justice to permit the issue to be altered. The former practice



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v.

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was to allow the answer to be amended: but now the course is to put in a supplemental answer. The question always is applied to the discretion of the Court in the particular instance, and in this it is enough to say, this affidavit will not do. The affidavit ought to state, that at the time of putting in the answer the Defendant did not know the circumstances, upon which he makes the application, or any other circumstances upon which he ought to have stated the fact otherwise (65).

(65) *Anto*, 285. *Jennings v. The Bank of England*, *anto*, *v. Merton College*, Vol. VIII, 284. *Bancroft v. Wentworth*, 79. Amendment of Exceptions: 285, n. tions on mistake: *Dolder v.*

1805.

Jan. 17th.

Feb. 8th.

As to the practice of moving upon the Certificate of the Master, that no examination is put in, or of the Six Clerk, that there has been no proceeding, &c. before the Certificate actually granted, and whether notice should be given by the Master, before he grants it, *Quære*.

## WILLS v. PUGH.

A MOTION was made to discharge an Order, that a party should stand committed for not putting in his examination before the Master.

Mr. *W. Agar*, in support of the Motion, stated, that the Order was obtained upon a false suggestion, that the Master's Certificate was granted on the 14th day of the month; though it was not granted till the 15th, and not filed before the 17th.

Mr. *Cullen* opposed the Motion; relying on the constant practice to grant this order upon the suggestion, that the certificate has been granted; the party being entitled to it at the time; though it is not granted till afterwards.

*The Lord CHANCELLOR.*

If I act upon this objection, I must undo all the practice. The course in these cases, where the party is entitled

entitled to the certificate of the Master, or of the Six-clerk, to entitle him to dismiss the bill for want of prosecution, is, that he asserts by his Counsel, that he has \* it; when he neither has it, nor could have it: but the Register will not draw up the order, until he sees, that the certificate is granted, and properly filed. Whether that is regular, or ought to be permitted, may be a question. It is said, there is no reason to complain; as the party is entitled to the certificate the moment the time has expired. But if this degree of strictness is to prevail, the officers of the Court must be confined in their offices. The practice, as it exists, is in direct opposition to every thing to be found in print. It has prevailed; as upon the whole there is no actual injustice; though the Court has overlooked, perhaps too easily, actual irregularity. In this case, if the Master would have granted his certificate upon the 14th, the other party is not prejudiced by granting it upon the 15th; though the assertion, that it was granted upon the 14th, is not true. I will speak to the Masters upon it.

1805.  
  
 WILLS  
 v.  
 PUGH.  
 [ \*403 ]

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This Motion was again made.

*Feb. 8th.*

*The Lord CHANCELLOR.*

I find, the practice as to the Six-clerk's certificate is not agreeable to any thing to be found in the Books of Practice. I recollect a practice 25 years ago, contrary to that, which now prevails. The motion to dismiss a bill for want of prosecution was always made upon a recital, that it appeared By the certificate of the Six-clerk, read in Court, that there had been no proceeding for such a time; the old practice requiring some evidence, that there was such a proceeding actually produced: the order, as drawn up, stating, that it did appear by the certificate of the Six-clerk, that no proceeding had been taken from the particular time to the

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moment

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WILLS

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[ \*404 ]

moment of exhibiting that certificate. In later times the contrary practice has become almost universal: so much so, that the common error would, if not corrected by some order, form the practice to a great degree, \*that the party, entitled to the certificate, is not to wait for it; but may move, as if he had it: the Register never drawing up the order, until he sees the certificate. That practice is so universal, that if now to be corrected, it will be better done by a prospective order than in the individual instance (66).

It was intimated upon this motion, that a similar practice prevailed in the Master's Office: viz. that, where time was given to a particular day to put in an examination, and the judgment of the Master was, that the examination was insufficient, and, where certainly his judgment would have led him to certify that, if the accidental absence of the Master prevented the party, entitled to that certificate, yet he moved, not only for a short order, to put in the examination in four days, but even for commitment, as if he had the certificate; and, if he afterwards got it, whether the motion was for the short order, or for commitment, that was sufficient. The circumstances of this case shew, that ought not to be the practice: supposing the fact to be, as represented, that the Solicitor went to the Office, and, in the absence of the Master represented, that from indisposition his client had not been able to put in his examination. Some of the Masters, I understand, give  
a notice,

(66) This practice is established: post, *M' Mahon v. Lisson*, Vol. XII, 465. *Browne v. Byne*, *Attorney General v. Finch*, 1 *Ves. & Bea.* 310, 368. *Day v. Snee*, 3 *Ves. & Bea.* 170. *King v. Noel*, 5 *Madd.* 13.

In that case, and *Reynolds v. Nelson*, 5 *Madd.* 60, the Certificate is erroneously stated to be given by the Clerk in Court; who has no authority to give a Certificate.

a notice, when they are going to sign such certificates; and then there would be no surprise. Therefore I wish to know, what is the correct practice of the Office as to granting these certificates.

1805.  
WILLS  
v.  
PUGH.

An Inquiry was directed as to the practice of the Masters.

LANGSTAFFE v. FENWICK.  
FENWICK v. LANGSTAFFE.

[ 405 ]  
ROLLS.  
1805.

THE bill in the first cause prayed a redemption; that in the second a foreclosure. The mortgagee was the attorney of the mortgagor; and in account settled between them had charged poundage for having received the rents; in which respect the account was impeached.

Feb. 14th.  
General Rule, that a mortgagee shall not charge for receiving the rents personally; though he may have a Receiver at the expense of the mortgagor.

Mr. *Bell*, for the Plaintiff in the first cause, as to that charge, insisted upon the general rule, not to allow it to a mortgagee, especially in the case of attorney and client.

Liberty was therefore given to surcharge and falsify an account settled, with that allowance; acquiescence having no effect; the mortgagee being the attorney of the mortgagor.

Mr. *Richards* and Mr. *Roupell*, for the mortgagee, contended, that, admitting the general rule, it could not prevent parties, setting accounts afterwards, making this allowance; that a mortgagee is not bound to receive the rents of the mortgagor, but is entitled to have a receiver at his expence; and observed, that these rents were very small, and the collection troublesome. The consequence therefore of an objection must have been the appointment of a receiver. They also insisted upon acquiescence; distinguishing between the effect of ignorance of the fact and of the law, as an excuse for that.

*The*

1805.

*The MASTER of the ROLLS.*

LANGSTAFFE

v.

FENWICK.

FENWICK

v.

LANGSTAFFE.

[ \*406 ]

Upon a great deal of this reasoning, if well founded, the rule must in many cases operate unjustly; for the Court does not permit a man to get out of the rule by shewing, that he was in a situation, in which it would have been justifiable to have had a receiver appointed. He is not permitted to shew, that case did exist. Nothing is considered as evidence, that the appointment of a receiver was necessary, but that appointment \*itself; and the Court takes the circumstance, that a receiver was not appointed, as evidence, that a receiver was not necessary. As to the acquiescence, whatever may be the effect of acquiescence in general, the relation of these parties prevents it in this instance: the one an attorney, and not only an attorney, but the attorney of the other party. The former was acquainted with the rule of the Court: the other was not. It was the duty of the attorney to inform his client, that he was not to allow that charge, if another person had been the mortgagee; informing him also, that the appointment of a receiver would be the consequence: but that was for the consideration of the client, so informed. In this case that information was not given to the client. The mortgagee claimed this allowance as of right; not stating the objection. The mortgagor allowed it, not aware of the objection. In that article, therefore, the account is impeached as erroneous. I do not enter into the distinction between the cases of an article allowed from ignorance of the law, and from ignorance of the fact. The reason of the admission is not material. He has not given his assent: that is, what the Court holds a binding assent. I do not mean to say, generally, that ignorance of the law will open an account: but, as between these parties, standing in this relation to each other, liberty must be given to surcharge and falsify (67).

(67) See ante, Vol. IX, 260. 2 Term Rep. 238. *Davis v. 271, 272. Scott v. Brett, Dendy, 3 Madd. 170.*

WILLIAMS v. COOKE.

ROLLS.

1805.

Feb. 14th.

THE bill was filed by assignees under a Commission of bankruptcy against a person claiming as a mortgagee. The title of the bankrupt was under a fine by a tenant in tail; as to whose legitimacy a question was made; and a decree was made, directing an issue, and reserving farther directions and costs. In that issue the verdict was against the legitimacy. The suit afterwards abated by the death of the mortgagee; and his representatives filed a bill of revivor. [ \*407 ] After a Decree the Suit may be revived by a Defendant, or the representative of a deceased Defendant.

Mr. *Heald*, for the original Plaintiffs, the assignees, objected, upon the authority of the case (68), before Lord *Hardwicke*, that a Defendant cannot revive except after a decree for an account; observing also, that this was merely a revivor for costs: the bill praying nothing but that the verdict may be recorded; to avoid that objection; referring upon that to *Morgan v. Scudamore* (69).

Mr. *Romilly* and Mr. *Hart*, for the Plaintiffs, in the bill of revivor, insisted, that they had an interest to establish the fact found by the verdict; that the case cited cannot be law; for in general a Defendant may revive after a decree; as upon bills for specific performance; for partition; that a trustee may convey the legal estate, &c.

*The MASTER of the ROLLS.*

The good sense is, that in every case, where a Defendant can derive a benefit from the farther proceeding, he may revive, unless there is a general rule against it.

The case stood over, to give an opportunity of producing authorities against the bill of revivor: but none were produced.

(68) *Anon.* 3 *Atk.* 691. *Schmedes*, post, Vol. XII, 311.  
See *Mitf.* 73. *Horwood v.* (69) *Ante*, Vol. III, 195.

**I**N *Hilary* Term Sir THOMAS MANNERS SUTTON, His Majesty's Solicitor-General was, upon the resignation of Sir BAUMONT HOTHAM, appointed one of the Barons of the Court of Exchequer.

Mr. GIBBS resigned the offices of Chief Justice of *Chester*, and Attorney-General to his Royal Highness the Prince of *Wales*; and was appointed Solicitor-General to his Majesty; and received the Honour of Knighthood.

Mr. DALLAS was appointed Chief Justice of *Chester*.

Mr. ADAM was appointed Attorney-General to his Royal Highness the Prince of *Wales*.

Mr. JEKYLL succeeded Mr. ADAM as Solicitor-General to his Royal Highness the Prince of *Wales*; and was appointed one of His Majesty's Counsel.

The following Gentlemen were lately appointed to the Office of Master in *Chancery*, upon several Vacancies by death:

Mr. *Campbell*: Mr. *Ridley*: Mr. *Stratford*: Mr. *Harvey*: Mr. *Cox*: Mr. *Stanley*: and (upon the death of Mr. *Ridley*) Mr. *Steele*.

Mr. PLUMER succeeded Mr. STEELE as a *Welsh* Judge.

THE SITTINGS  
AFTER HILARY TERM,

45 GEO. III. 1805.

RUSHFORTH, *Ex parte.*

1804.  
March 15th,  
16th.  
1805.  
Feb. 5th.

**B**ENJAMIN and William Rushforth, carrying on business in partnership, as merchants, having a banking account with Seaton and Co. bankers at *Huddersfield* in *Yorkshire*, applied to their brother *Richard Rushforth*, the petitioner, to join them in a bond to indemnify the bankers against their advances; engaging to deposit with the petitioner the title-deeds of a real estate and a lease of other premises, and to make a regular mortgage of the real estate, as a security to the petitioner, and as an inducement to him to become surety for them. Accordingly a joint and several bond, dated the 7th of *June* 1800, was executed by the three *Rushforths* to *Seaton* and Co. in the penal sum of 10,000*l.*; with condition to be void, if they or any of them, their or any of their heirs, executors, or administrators, should from time to time and at all times, thereafter within the space of two calendar months next after notice in writing, pay *Seaton* and Co. their heirs, executors, &c. all and every such sum and sums of money, which shall and may at any time or times here-  
after

Surety by bond for advances generally, but under a limited penalty, not liable beyond that amount; and, paying that sum, is entitled to a proportion of the dividends on the proof by the creditor to a greater amount under the Bankruptcy of the principal debtor.



1806.  
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 RUSHFORTH,
Ex parte.

after be paid or advanced by *Seaton* and Co. on account of *Benjamin* and *William Rushforth*, by payment or discounting of drafts, bills, &c.; with interest and Commission.

By indentures of mortgage, dated the 3d and 4th of *November*, 1800, in order to indemnify the petitioner against that bond *Benjamin* and *William Rushforth* conveyed an estate, called *Marshall Hall*, to the use of *Richard Rushforth*, and his heirs; subject to a proviso for redemption, if *Benjamin* and *William Rushforth*, or either of them, &c. should within two calendar months after the notice in writing, &c. upon them and the petitioner, or after notice in writing by the petitioner upon *Benjamin* and *William Rushforth*, pay *Seaton* and Co. all such sum and sums, which are or shall be advanced by them on account of *Benjamin* and *William Rushforth*, by payment or discounting of drafts, bills, &c.; and if *Benjamin* and *William Rushforth*, their heirs, executors, &c. shall indemnify *Richard Rushforth*, and his heirs, executors, &c. against the said bond, &c. and all actions, suits, losses, &c. by reason of his having executed the said bond; and it was provided, that, in case the petitioners should be called upon, or be damnified, it should be lawful for him to enter upon and sell the premises; and that out of the purchase-money he should first pay the expences; next discharge all such sums as should be due by *Benjamin* and *William Rushforth* to *Seaton* and Co. in respect of the bond; and next indemnify himself against the bond; and pay the remainder to *Benjamin* and *William Rushforth*, their executors, &c.

On the 16th of *June*, 1803, a notice according to the bond was served by *Seaton* and Co. upon the petitioner, to pay them all such sums as *Benjamin* and *William Rush-*
forth

forth were indebted to the obligees on their banking account; upon which the petitioner served a similar notice on *Benjamin* and *William Rushforth*. On the 23d of *June* a Commission of Bankruptcy issued against *Benjamin* and *William Ruthforth*. *Seaton* and Co. proved under the Commission a debt of 20,000*l.* upon the balance of their banking account. After that proof they called upon the petitioner to pay 10,000*l.* under the bond, as surety. Having paid 4270*l.* in part, he presented the petition; praying, that the freehold and leasehold estates may be sold; and the money, produced by the sale may be applied, after paying his costs and charges, in discharge of the bond; and, if the petitioner before such sale should pay the said 10,000*l.* to *Seaton* and Co., then that the purchase-money may be paid to him, in satisfaction of the said 10,000*l.* so far as it will extend; and that upon his paying 10,000*l.* to *Seaton* and Co. they may be ordered to assign to him the benefit of the dividends on the sum of 10,000*l.* or so much of such dividends as would remain after satisfying *Seaton* and Co. the proportion they would be entitled to out of such dividends upon the residue of their debt, if 10,000*l.*, part of their said debt, were expunged from the proceedings; and that if the money arising from the sale should not be sufficient to discharge such costs and charges and the said 10,000*l.*, then, that the petitioner may either be permitted to stand in the place of *Seaton* and Co., for so much of the said 10,000*l.*, part of the said proof made by them under the Commission, as the produce arising from such sale should be deficient to satisfy, subject to the right of *Seaton* and Co. to receive out of such dividends their proportion on the residue of their debt, as if such 10,000*l.* had been expunged; or, that the petitioner may be permitted in his own name by virtue of the covenants in the mortgage deed to prove so much of the * said 10,000*l.*, as the produce arising from the said sale should be deficient to satisfy.

1805.

RUSHFORTH,
Ex parte.

[* 412]

Mr.

1805.

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 RUSHFORTH,  
*Ex parte.*

Mr. *Mansfield*, Mr. *Romilly*, and Mr. *Cooke*, in support of the Petition.

Upon the point, as to expunging the proof, in respect of the payment by the petitioner, as between *Seaton* and Co.<sup>r</sup> and the general creditors, the question is only, Whether there is any distinction between a negotiable security given for this purpose, and a specialty, a bond, as in *Ex parte Wallace* (70), *Ex parte Crossley* (71). As between principal and surety, if the latter had no security, and paid the whole debt, he would have an indisputable right to stand in the place of the creditor: *Ex parte Marshall* (72); followed by many cases: *Ex parte Atkinson* (73). *Beardmore v. Cruttenden* (74). *Ex parte Turner* (75); and the proposition is clearly recognized by your Lordship in *Wright v. Simpson* (76); and the case of *Philips v. Smith* (77) went farther; making it compulsory upon the principal to prove the debt; in order that the surety might have the benefit. Then, as against the assignees, the amount of the debt, being 20,000*l.* cannot make any difference. The surety desires to stand in the place of the creditor only for the deficiency after application of the pledge. As between the surety and *Seaton* and Co. the equity of the surety is clear to have the proof retained for him. The case, *Ex parte Turner*, shews, that the effect of the payment by the surety is, that the debt must clearly be expunged, if the  
 surety

(70) 1 *Cooke's Bank. Law*,  
 155; 8th edit. 176.

(71) 1 *Cooke's Bank. Law*,  
 157; 8th edit. 177. 3 *Bro.*  
*C. C.* 237.

(72) 1 *Atk.* 129, 131.

(73) 1 *Cooke's Bank. Law*,  
 210; 8th edit. 232.

(74) 1 *Cooke's Bank. Law*,  
 211; 8th edit. 233.

(75) *Ante*, Vol. III, 243,  
 see the note.

(76) *Ante*, Vol. VI, 734.  
 See 2 *Swanst.* 191; and the  
 note.

(77) In the Court of Ex-  
 chequer.

surety had not an Equity to have it retained for him; which Equity does not prejudice the right the principal creditor would have had, if the proof had been actually expunged. To support the proposition, founded upon the objection, that the principal creditor is injured by the effect of the proof of the surety, taking away part of the fund, that would otherwise be liable to the principal creditor, this must be brought within the case of co-obligors, or co-debtors upon a bill of exchange. The principle, upon which they are allowed to continue to prove and receive dividends upon all their securities, until fully satisfied, which is certainly established, depends upon the legal right of the creditor to sue all the parties. But if he is paid 20s. in the pound by one party, there is an end of his proof. That is so laid down by Lord *Hardwicke* in *Ex parte Wildman* (78). These creditors therefore must make out a legal right to sue both debtors to the extent of 20,000*l.*: otherwise they have not that double remedy, upon which Lord *Hardwicke* puts the Equity of the creditor; and in *Ex parte Marshall* Lord *Hardwicke*'s first opinion was in favour of the equitable against the legal right; though certainly afterwards he changed that opinion. But these creditors have a right to sue both to the extent of 10,000*l.* only; and the surety, paying that sum, would pay the whole debt in full; and upon the authorities therefore would have a right to stand in the place of the creditor paid.

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It has never been decided, that, if the creditor received part of his debt from a third person, not under any obligation to pay, he would have a right to receive dividends upon his whole proof. Certainly there is no decision the other way. Upon the proposition, now contended, the bankrupts may complain of injury; if this debt, actually paid, is not to be treated as expunged:

as

(78) 1 *Atk.* 109. 1 *Cooke's Bank. Law*, 151; 8th edit. 173, 4.

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as their allowance, depending upon the amount of the dividends, and their surplus, may be affected. The effect is, that, they pay the debt twice: first, by the creditor's proof under the Commission: 2dly, in consequence of the right of the surety to call upon them. The surety also is injured in this respect; as a fund, that might come to the bankrupt, and be the means of his paying the surety, is taken away. Upon the construction of the instrument clearly there is no engagement by this petitioner to pay more than 10,000*l*. There was no intention to give credit beyond that amount. The bond is absolute for that sum. The object of the condition was to diminish, not to increase, the penalty; which was intended to be the absolute sum of 10,000*l*; not, as part of a larger debt; and that is circumscribed by the condition: so, that, if the debt should not extend to 10,000*l*., they were to pay only what should be actually due.

*The Lord CHANCELLOR.*

Surety in a bond may compel the creditor to prove under the Bankruptcy of the principal debtor; and the creditor will be a trustee of the dividends for the surety, paying the whole.

Some propositions, having reference to this question, are perfectly clear. It is now the settled Law, that a surety in a bond may compel the principal creditor to go in and prove the bond under the Commission; and, if the surety pays the whole, the creditor will be a trustee of the dividends for him (79). It is clear also since *Ex parte Marshall*, that, if there are different names upon a bill of exchange, and Equities among those persons, that one should pay first for the benefit of the others, if nothing is paid before proof, made by the holder, none of the others can avail himself of that Equity by paying a part under the bill, until the holder has received 20*s*. in the pound.

But a person, liable with

(79) Ante, Vol. VI, 734.

others upon a bill of exchange, cannot raise that equity by payment, subsequent to the proof of the holder, until he has received 20*s*. in the pound.

In

In a case *Ex parte Wood* (80) Lord *Thurlow* decided, that if a surety before the bankruptcy paid part of the debt, the circumstance of his paying it before the bankruptcy entitled him to prove for so much as he paid, even to the prejudice of dividends the bond-holder would have had out of the estate; and Lord *Thurlow* would not go to the nicety, that was adopted in *Ex parte Turner*. The case arose upon a joint and several bond, executed by *Cox* and *Jameson*, *Cox's* estate paid a great part of the debt by dividends under a Commission against him. He was surety. Afterwards *Jameson*, the principal, became a bankrupt. The bond-holders proved only the remainder of their debt under his Commission. *Cox's* assignees proved the amount of the dividends they had paid. The bond-holders presented the petition; insisting, that the assignees of *Cox* should not receive dividends to their prejudice; and should hold dividends, that had been received, in trust for the petitioners. Lord *Thurlow* dismissed that petition; holding, that, though *Jameson's* assignees would have to pay dividends, to those bond-holders, yet in respect of what had been paid by *Cox's* assignees previously to the bankruptcy of *Jameson* they should have liberty to prove so much; and the dividends paid to *Cox's* assignees according to that would be part of *Cox's* estate, and divisible among all his creditors; and Lord *Thurlow* thought, the distinction was, that in *Ex parte Marshall* the payment was after the bankruptcy, and in the other case it was previous to the bankruptcy; and he could not go into farther nicety.

That case, as far as it goes is in favour of this petition. As to the distinction taken in *Ex parte Turner*, I think, there is natural Equity in it. In *Ex parte Wood*,  
both

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both *Cox* and *Jameson* being debtors upon the bond, there was an Equity, that the assignees of the former should not take a dividend from the estate of the latter to the prejudice of the bond-holders: that dividend being to be paid, not to the bond-creditors, but to all the creditors of *Cox* in general.

*The Solicitor General, for Seaton and Co.*

This case is distinct from any, that have been mentioned; being the case of principal and surety. The debt, due by this bond, is one debt, that cannot be separated; as a party, liable under a particular bill, may separate his liability; having no connection with the bankrupt or the creditor but by that bill. The petitioner proposes to pay a part of the debt; which cannot be distinguished from the rest; and he is liable for the whole. Though the penalty of the bond is only 10,000*l.*, the object of the petitioner's security was to make him liable to the whole balance. In the case of the bill the party is liable only upon that particular bill, in that particular transaction: but these creditors, having proved the whole debt, are entitled to a dividend upon the whole; and having received that may go against the surety, if necessary. Where the whole debt is paid by the surety, the principle is intelligible: but, where he pays only part, the effect is to take away the double security.

*The Lord CHANCELLOR.*

Proof against each person, liable upon a bill or bond, if nothing received before the bank-

I have had great doubt upon this case. It is clear, where a person has a demand upon a bill or bond against several persons, and no part of that demand has been paid before the bankruptcy by any of them, he may

ruptcy, until 20*s.* in the pound received; without distinction, whether principals or sureties.

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may prove against each; and the circumstance, that one is a surety, the other the principal, or a co-surety, as between themselves, does not give a right to stop the holder, receiving dividends, until he has received 20s. in the pound. That is well settled in *Ex parte Marshall*, and *Ex parte Wildman*; and it applies to joint and several demands, either by bill or bond. In *Ex parte Marshall* it happened, that the person was acceptor without effects; therefore, for the accommodation of the drawer; and, being so, if he had paid the bill in full, he had a right to insist, that they should hold the proof for his benefit. If the security carries interest, is that equity to be extended to the prejudice of the creditor's claim of interest? In the case of *Cox* and *Jameson* the money, paid by *Cox's* assignees, was paid and advanced for *Jameson*, and the bond-holders insisted, *Cox's* assignees should not prove against *Jameson's* estate; for though it was true, the bond-holders could only prove the residue of the debt, yet *Cox's* estate was also debtor to them for that residue; and *Cox's* assignees should not draw, in respect of what they paid before the bankruptcy, out of a fund, also liable with them to the residue of that debt. Suppose, there had been no one else to prove; that *Cox's* assignees had paid 5000*l.*; and that was one half of the debt: it is singular; but Lord *Thurlow's* opinion was, that, if there was no one to enter into competition but those two parties, *Cox's* assignees should take out of the estate of *Jameson* 2500*l.*, for instance; the bond-holders taking the other 2500*l.*: the sum taken by *Cox's* assignees to be divided among all his creditors. The consequence would be, that he, a co-obligor with *Jameson*, would take one-half of what was in the hands of *Jameson*. That does not appear very equitable: but Lord *Thurlow*, regarding the rule of Law, thought, it would create too much nicety, if, because so strong a case as that might be



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put, he was to run through all the *minutiae* of all these cross and subtle equities.

Lord *Rosslyn*, in *Ex parte Turner*; laid down a different rule: a case certainly constituted of different circumstances: the former being one bond, covering the whole debt; and yet the relief was refused to the creditor: the latter case furnishing more objection to such relief: the demand being upon a great variety of securities, upon which a great number of persons were answerable, getting into the hands of the creditor, as security for a cash balance. The first question does not seem clearly decided, whether the petitioner could under the circumstances be entitled to stand in the place of the creditor at all: the purpose of the deposit not being fully answered. Lord *Rosslyn* however thought the petitioner entitled to some benefit; and then came the question, in what shape? If that case is rightly determined, it leads to extreme nicety: the proof being considered both as expunged, and as not expunged; and, to ascertain that equity, an account must in every case be taken, what is the amount of the debts at the time; what is to be the proportion of the dividend, if that arrangement is to be made; and what, if it is not to be made. I am therefore not without hesitation, whether I ought to follow that Order.

Ground of re- The present case is not in circumstances like any
 ducing in the other; and no cases in point have been cited. In the
 first instance case of all mortgages, whether of real or personal
 the proof in estate, the ground, upon which the proof is reduced in
 bankruptcy in the
 cases of mort-
 gage and deposit of securities. As to the effect of indorsement to
 secure a debt to a greater amount, *Quære*.

Distinction as to accommodation paper, the proof not to be expunged; but to be held for the benefit of the person paying, in nature of a surety.

the first instance, is, that the creditor has got part of the bankrupt's estate; and Mr. *Cooke*, in his last edition (81) admits, that if bills and securities, not indorsed by the bankrupt, are deposited with the creditor, ultimately the same arrangement is made, as if the value could be ascertained at the time of the proof. Then does the indorsement of the paper make a substantial difference? If the question is put, unconnected with the fact of indorsement, and the demand upon one paper, the old rule applies. But, where the debtor indorses paper of less value, meaning to make it a security for a debt, I doubt, whether the indorsement means more than to enable the party to operate a farther benefit, than if the debtor had not indorsed it; and, I doubt, whether the case, *Ex parte Wallace*, goes farther than that. It has been said, there is no difference, whether it was the bankrupt's paper, or accommodation paper. I doubt that, for this reason. If it was accommodation paper, the proof could not be expunged; for the man, who pays it, pays for the use of the bankrupt after the bankruptcy, and is in truth a surety for the bankrupt; and would have a right to insist, that the proof should be held for his benefit. But under the circumstances of *Ex parte Wallace* he could not insist upon that; for the assignees would have a right to say, as between them and him, there ought to be no proof; and then it would be only a question of expunging; and in all the cases of a single paper the right to expunge turns upon the point, whether the bankrupt's estate has got home to the creditor.

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This is not the case of a deposit of the bankrupt's property, nor a security upon the bankrupt's property, nor a pure debt of 10,000*l.*, unconnected with any thing else. But a third person enters into a bond under the
 penalty

(81) 1 *Cooke's Bank. Law*, 5th ed. 123; 8th ed. 146.

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Rule, that a man, engaged for the whole debt, and paying only part, has no equity to stand in the place of the person paid.

penalty of 10,000l.; with a condition for payment to other persons of bills, notes, &c. without limit as to the amount: but the extent of the demand as to that person being limited to 10,000l. the question upon that is, whether he shall say, not, that he will have the benefit of his mortgage, or do any other acts, but, that he has in equity a right to make the obligees trustees for him of certain securities; all of which were, as between them, intended to be paid by other persons; and he was, as between them, not to pay more than 10,000l. The rule certainly has been, that, where a man, engaged for the whole of a debt, pays only a part, he has no equity to stand in the place of the person paid. That brings it to the question, what is this engagement, whether for the whole or a part.

Another petition was afterwards presented by the same petitioner; stating a sale of the freehold and leasehold estates under an Order, made on the 17th of *April*, 1804; that the petitioner was the purchaser of them, in two lots, for the sums of 2100l. and 510l.; and, these sums not being sufficient to indemnify him, praying a conveyance; and that upon his paying 10,000l. to *Seaton* and Co. they may be ordered to assign to him the benefit of the dividends, &c. as in the former petition.

The petitions stood for judgment (82).

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The Lord CHANCELLOR.

If the question had rested upon the bond given by the three *Rushforths*, one of them being a surety, and the

(82) The judgment *ex relatione*.

the debt under 10,000*l.* he would have had a right to stand in the place of the principal creditor, and to have the other securities made over to him. The instrument upon the face of it is an agreement to advance all such sums of money as the two *Rushforths*, the bankrupts, should draw for; and the bond is for 10,000*l.* The bankrupts conveyed to the surety a real estate, by way of mortgage, and also gave him an equitable mortgage of other property, upon the same trusts, subject to a proviso for redemption, and a power to *Richard Rushforth*, the surety, if he should be called upon, to enter and sell; and he is expressly made a trustee of the produce of the sale in the first place for the persons, who are the obligees in the bond. The bankers could have called upon him to sell the estate, and to apply the produce in discharge of the debt due to them, before any application for his own indemnity. A written notice was given by the bankers to the surety; and it appears, they had swelled the debt to 20,000*l.* He gave similar notice to the bankrupts, and the Commission afterwards issued. The consequence is, that to the extent, in which he had not paid previously to the bankruptcy, he could work out satisfaction only by standing in the place of the principal creditor. Proof was made by the bankers to the extent of 20,000*l.*; and they called upon the surety to pay 10,000*l.* He did pay above 4000*l.*; and was willing to pay the residue upon having an assignment to him of the benefit of the proof, made by the principal creditor. The question as to the leasehold estate is no more than, whether he had an equitable lien. Upon the part of the petitioner it was contended, that he states nothing more, than the common equity of a surety; and it is clear, that if the debt had been only 10,000*l.*, this equity would have resulted; and he could have compelled the bankers to prove for his benefit, and make over their securities.

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securities. A surety is entitled to all the securities the principal has. But it is said, here the debt is 20,000*l.*; and they are entitled to hold the whole proof against the surety; and the assignees, on the other hand, contend, that, when they have received 10,000*l.* that ought to be struck off from their proof. With reference to that, the question comes round to this; whether, according to the true nature of such an engagement between all the parties in this bond and mortgage, it was competent to these bankers to go on without giving notice to the surety; for this is a case in which they contracted to give him notice before forfeiture of the bond; whether they were at liberty to swell the demand to his prejudice beyond the sum of 10,000*l.* The agreement was to advance all such sums as should be required: but it is limited by an express contract for an obligation to secure all those sums; and the question is, whether that limitation in the extent of the obligation is not a sufficient ground for the inference, that those sums were not to be extended beyond 10,000*l.*, to the destruction of every right of the surety. Take the case of two sureties, each for the separate sum of 10,000*l.*: each, paying the principal creditor, would be entitled to stand in his place for the sum paid. It would be very strong to hold, that, as they have taken but one surety, he shall be in a worse situation. I think, the bankers are not entitled in equity to say, as against the surety, that their demand is more than 10,000*l.* the amount of the bond he has given; upon which he would be *primâ facie* entitled to stand in their place: as to the residue of their debt, they ought to be considered, if I may so express it, as their own insurers. He is entitled to stand in their place; but not for the whole sum of 10,000*l.*; for the money produced by the sale of the estate must be considered as received by the bankers. He will, therefore,

therefore, be entitled to stand in their place for the difference.

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Ex parte.

As this is perfectly a new case, I make the Order, with liberty to file a bill.

The Order was made with the qualification in *Ex parte Turner* (83).

(83) *Paley v. Field*, post, notice of any act of bankruptcy, may prove, or stand in the place of the principal, having proved.
Vol. XII, 435. By Statute 6 Geo. IV, c. 16, s. 52, Surety, previous to the Commission, paying afterwards, without

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16th, 18th.

ADAM WILKINSON, seised of freehold and copyhold estates of inheritance, in the county of Northumberland, subject to a mortgage to Henry Errington, and possessed of leasehold estate, and also of several shares of lead mines in that and other counties, in June 1779 conveyed, and assigned all the said estates, and all his personal estate, to Henry Errington and James Liddle, in trust to sell, and pay the mortgage, and all other debts; and as to the residue in trust for Wilkinson, his executors, &c,

Purchase by trustees of the trust property set aside; not being within the exception to the rule: viz. full information to the *Cestui que trust*; and no advantage

Errington taken by the trustee of his

situation to produce a beneficial bargain to himself.

Trust, upon a re-sale, as to the price received. Considerable length of time before the bill had no effect; as it did not distinctly appear, that the *Cestui que trust* knew, the purchase was made on account of the trustees.

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Errington and *Liddle* took possession under the trust-deeds. *Wilkinson* died in 1790, intestate. *Errington* took out administration to him; and survived his co-trustee.

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The bill was filed in 1801, by the next of kin of *Wilkinson*, among other objects, for an account of the trust-property against *Errington* and the executor of *Liddle*; and particularly, that the sale of the *Cherry-Tree-Hill* estate to *Errington* and *Liddle*, and of the shares of the lead mines to the Defendant *Robert Hodgson*, may be set aside; and, if the sale of part of the lead-mine shares to the Defendant *Dodd* was without notice, that an account may be taken of the * difference between the real value and the price, that was given; to be paid by *Errington* and the executors of *Liddle*.

The answers stated, that in *July* 1780, *Hodgson* purchased the estate, called *Cherry-Tree-Hill*, in trust for *Errington* and *Liddle*; which purchase was made, in order to procure a convenient residence for *Wilkinson*, rent free, but which he afterwards refused to accept, at the price of 500*l*. They also stated, that the shares of the mines were in *July* 1779 purchased by *Hodgson*, in trust for *Liddle*, at the sum of 500*l*. The Defendants denied all fraud; and insisted, that the prices paid were as much as could be got. They relied on the length of time; and stated, that *Wilkinson* was perfectly satisfied with the sale; and joined in the assignment to *Hodgson* of the shares of the lead mines. The sales were by auction; and there was contradictory evidence as to the value.

Mr. *Alexander* and Mr. *Raynsford*, for the Plaintiffs.

These purchases of the trust-property by the trustees for their own benefit cannot stand. The *Cestui que Trust*

Trust had no control over or management of the sale. The whole was under the direction of the trustees and their agents. In the sale to *Hodgson*, in trust for *Liddle*, the vendor was imposed upon; being led to think, *Hodgson* was bidding for himself. That sale also was made in a very improvident mode: these separate shares of mines having been put all up in one lot. The *Cestui que Trust* may waive the relief he might be entitled to against the person, to whom the trustee sells; and, not disputing that sale, may make the trustee account for the price; as in *Fox v. Mackreth* (84). It is represented, * that *Wilkinson* was satisfied with the sale: but that circumstance would not take the case out of the rule, that a trustee shall not unite in himself the character of seller and buyer. It does not appear, except by one witness, swearing at a great distance of time to a loose conversation, that *Wilkinson* ever was acquainted with the fact. The circumstance, that he joined in the conveyance, cannot make a difference. In *Crowe v. Ballard* (85), and many other cases, it is laid down, that a person in such a situation, an oppressed man, in the hands of these persons, cannot confirm the transaction. The whole effect of their representation is, that he was present, when some of these estates were put up to sale. As to the objection from the length of time, before the bill was filed, this is a general and continuing trust; and was not executed even at the time the bill was filed: They were making sale from time to time, and paying debts; and in 1800 a considerable part of the estates was disposed of. No account was given. The *Cestui que trust* was not bound to apply upon any part of the transaction: the whole trust not being concluded. It is not like a single transaction. Two of the persons, now interested as representatives, are married women; and all

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(84) 2 Bro. C. C. 400.

(85) Ante, Vol. I, 215,
3 Bro. C. C. 117.

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all are in low circumstances, ignorant of their rights and of *Wilkinson's* affairs.

Mr. Romilly, Mr. Hollist, Mr. Trower, and Mr. Bell,
 for the Defendants.

Admitting the propriety of carrying the rule to the extent, to which it has been carried in the late cases, which are all referred to in *Coles v. Trecothick* (86), certainly farther than it went formerly, there is no rule, that a trustee shall not buy from the *Cestui que Trust*.

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[426] Clearly there is no such rule as that. The rule is, that a trustee shall not buy for himself.

For the Defendants.

Wilkinson himself was a party to the conveyance; and, as far as he could, sanctioned it. He was well acquainted with the mining business. This is an attempt to set aside these sales after acquiescence for eleven years by him, and for eleven years more, since his death, by these Plaintiffs. At such a distance of time fraud cannot be presumed; and there is no evidence of it. The sales having been made by auction, inadequacy of value would have been no ground; even if the bill had been filed immediately; according to *White v. Damon* (87). Upon the Rule of Limitation, adopted in Equity, by analogy to the Statute of Limitations, according to *Lord Deloraine v. Brown* (88), and *Smith v. Clay* (89), no relief can be given.

The

(86) *Ante*, Vol. IX, 234.
 See also *Ex parte Bennett*,
ante, 381, and the note, III,
 752, to *Whichcote v. Lawrence*.

(87) *Ante*, Vol. VII, 30.
 See the note, VIII, 137.
 (88) 3 *Bro. C. C.* 633.
 (89) 3 *Bro. C. C.* 639, n.

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As to the sale to *Errington* of the *Cherry-Tree-Hill* estate, it does not distinctly appear, how he individually became the purchaser. The representation by the answer is, that it was purchased by the two trustees with the particular intention to let *Wilkinson* himself have it for a residence. That intention failed; *Wilkinson* refusing to take it for that purpose. It is clearly then the case of a purchase by a trustee; and upon the ordinary rule it cannot stand; admitting, that a trustee may purchase from the *Cestui que trust*, under the limitations, and with the restrictions laid down by the *Lord Chancellor* in *Coles v. Trecothick*; provided it is distinctly and fully understood by the *Cestui que trust*, that he is selling to the trustee, and the trustee takes no advantage of his situation, to produce a beneficial bargain to himself. But the length of time, that has elapsed, is objected. Acquiescence may have the same effect as original agreement; and may bar such a remedy as this. But the question as to acquiescence cannot arise, until it is previously ascertained, that the *Cestui que trust* knew, his trustee had become the purchaser; for, while the *Cestui que trust* continued ignorant of that fact, there was no laches in not quarelling with the sale upon that special ground. It does not appear to me distinctly ascertained, that *Wilkinson*, or these Plaintiffs down to a recent period, knew, that *Errington* had become the purchaser. If the purchase was made with *Wilkinson's* privity for the purpose, stated in the answer, of his residence, when that purpose failed, the conclusion is, that it remained in effect unpurchased, a part of the trust-property: the object, for which it was taken out of the mass of the trust-property, not being accomplished. Upon the part of *Errington*, therefore, distinct and explicit information was necessary, that, the original purpose having failed, he had taken the estate to himself, and meant to keep it at that price. I do

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do not say, knowledge may not be inferred from circumstances: but there are no circumstances creating that inference in this case. The possession was ambiguous. The trust was not completely executed. Part of the estates remained unsold till 1800. The trustee was in possession of those estates as trustee. If the purpose, for which the purchase was made, failed, *non constat*, that *Wilkinson* might not suppose, that estate was * in the possession of the trustee for the purpose of the trust: as the other property was. At all events, to fix acquiescence upon a party, it should unequivocally appear, that he knew the fact, upon which the supposed acquiescence is founded, and to which it refers. In this case there is no such distinct, explicit, evidence; and therefore upon the common principle, being a purchase by the trustee, it cannot stand.

The case as to *Liddle* turns upon the same principle. A considerable length of time has elapsed; and it is with great reluctance that the Court unravels matters at a great distance of time; when the circumstances may have undergone considerable alteration; and it is possible, that, if the transaction had been questioned recently, the party would have conceived, that he had very little interest in disputing what was done. But upon the sale of the lead mines there is no evidence whatsoever, that *Wilkinson* knew, *Liddle* had become the purchaser. It is said, *Wilkinson* was satisfied with the sale to *Hodgson*; for he joined in the conveyance. That is evidence, that he was not then dissatisfied with the price. But the question never is, whether the sale was at a fair price or not. The trustee cannot protect himself from the effect of the rule by saying, "You have got as good a price as you could have got from any other person." The *Cestui que trust* has a right to say, "I will try, whether it will sell better;" and he has a right to whatever profit or advantage the trustee

trustee has made by the purchase. Nothing more results from the circumstance, that *Wilkinson* joined in the conveyance, than that, as a sale to *Hodgson*, he was satisfied, and willing to confirm it. But he did not know it was a sale to *Liddle*. The only evidence of that is an ambiguous expression in the executor's answer, that *Wilkinson* knew of, and approved, the sale to *Hodgson*, in trust for *Liddle*. That means no more than that he approved that sale to *Hodgson*, which *Liddle* states to be in trust for him. If the Defendant meant any thing else, he should more distinctly and explicitly have stated, that *Wilkinson* knew it was in trust for *Liddle*, and approved of its being so made. It is the Defendant's fault therefore, if that fact existed, and is not distinctly made out. It was his business to shew all, that is necessary to constitute an exception to the rule; for *prima facie* a purchase by the trustee cannot stand. He ought to shew notice to the *Cestui que trust*, distinct information to him, acquiescence after that distinct information communicated. That is not done; and therefore as to *Liddle* I must open the sale to him; and with regard to the parts, that he has sold, must hold him a trustee, upon the principle in *Fox v. Mackreth*.

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COCK v. RICHARDS.

1805.

Feb. 21st.

A MOTION was made for an Injunction, to restrain the Defendant from proceeding to execution in an action of covenant against the Plaintiff, under the following circumstances, admitted by the answer:

Bond, to marry a woman, or pay a sum of money, established at law.

The Plaintiff was an apprentice to *John Tovery*, a shipwright in the King's Dock-yard at *Woolwich*; and the

Injunction, till the Hearing, on grounds

of public policy: being an engagement, founded upon expectations under the Will of a third person, (though not a relation) from whom it was kept secret, to marry at his death; and no mutual obligation.

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the Defendant was a female servant in the same family. An attachment took place between them, when they were both about the age of 22; and he promised to marry her, if she would wait till the death of *Tovery*; from whom, though no relation, he had expectations. In 1795 she consulted him about leaving her master; and requested to know, what he wished her to do; he told her, she might make herself perfectly easy as to her future provision in life; and that he would give her a bond, as a security for the performance of his said promise of marriage, in any sum she chose; and he advised her to quit her service; alleging as a reason, that he would rather take her in marriage from her father's house than from Mr. *Tovery's*. In consequence of that conversation, being requested by him to fix the amount of the bond, she named the sum of 2000*l.*; and he accordingly gave and delivered to her the following instrument, drawn by himself:

“ Know all men by these presence that I *Francis Cock*
 “ Sawyer's Measurer of His Maj^y Dock Yard *Woolwich*
 “ in the County of *Kent* am held & firmly bound by these
 “ presence to *Elixth Richards* of the Parish of *Woolwich*
 “ in the County of *Kent* duly & truly to marry the s^d
 “ *Elixth Richards* within the space of one Whole year
 “ after the death of M^r *J. Tovery*” Master-Shipwright, &c.
 “ and in Case I the s^d *Fr^s Cock* sh^d at the expiration of
 “ the Term afores^d refuse to marry the s^d *El^h Richards*
 “ of the afores^d Parrish and County then I the afores^d
 “ *Fr^s Cock* of the afores^d Parris and County am held
 “ & firmly bound by the presence to pay to the s^d
 “ *Elixth Richards* of the afore^d Parrish & County the sum
 “ of 2000*l.* of lawful money of *G^t Britain*; and in case
 “ I the s^d *Fr^s Cook* sh^d at the expiration of the Term
 “ afore^d refuse to perform either of those Agreements
 “ afores^d, then I the s^d *Fra^s Cock* Do submit myself to be
 “ proceeded ag^t as the Law shall direct. Given under my
 “ hand

" hand this 19th day of *March* 1795, & in the 35th y'
" of the reign of Our Sovereign L^d *Geo.* 3." &c.

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* This instrument was signed by the Plaintiff, and purported to have been signed, sealed, and delivered, in the presence of two witnesses: but the witnesses subscribed a blank paper. At the execution of this instrument the Plaintiff's property was about 400*l*. He informed the Defendant, that he had seen *Tovery's* Will; that he was appointed sole executor; and, as there were only a few inconsiderable legacies, he would be possessed of property to a considerable amount. At that time his income from his situation in the Dock-yard, and his own property, was 190*l*. a-year. The only income of the Defendant was her wages and perquisites, amounting in the whole to 12*l*. a-year. Soon after the execution of the bond she quitted her service, and went to live with her father. *Tovery* died in 1802. An affectionate correspondence was kept up between the Plaintiff and Defendant: his letters containing repeated assurances of making her his wife on the death of *Tovery*. The Plaintiff continued those assurances of marrying her, notwithstanding he was married to another woman, and had been married a considerable time previous to the death of *Tovery*. By a letter, dated the 11th of *May*, 1802, giving an account of that event, the Plaintiff states, that he and his brother were left equal and joint executors; that *Tovery* had given from them only 806*l*., and that the time is drawing near for their union.

The action was tried in the Court of *Exchequer*, and a verdict recovered for 2000*l*. A motion, that the Defendant at Law might be at liberty to enter up a nonsuit, upon the grounds, that the bond had not the proper stamp, and that it had not been properly delivered, was refused; and a motion, in arrest of judgment, on the ground, that it was in restraint of marriage,

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riage, and not mutual, also was unsuccessful. Upon the failure of that motion the bill was filed; praying an injunction; and that it may be declared, that the bond was unduly and unfairly obtained: and that it may be delivered up to be cancelled; or, that an issue *quantum damnificatus* may be directed. The residue of *Tovery's* property, taken under his Will by the Plaintiff and his brother, according to the bill was about 8000*l.* between them.

The Defendant denied, that the bond was obtained unfairly, by undue influence, control, &c. and that the Plaintiff was obliged to keep it a secret from his master: it not being necessary to do so for any other reason, than for fear it might induce *Tovery* to make some alteration in his Will.


Mr. *Romilly* and Mr. *Wetherell*, in support of the Motion for an Injunction.

The principle of *Woodhouse v. Shipley* (91) applies closely to this case. Though this is not the case of a son, having expectations from his father, giving a bond to marry after the father's death, it is the case of a young man, in a manner adopted by his master, giving a bond to marry, when, by his master's death he gets the fortune he expects. There are strong circumstances in this case, that did not occur in that. As in *Lowe v. Peers* (92), there is no reciprocity here: this Defendant not being bound to marry the Plaintiff. This Plaintiff is a young man, under the influence of an attachment for the Defendant, which she uses for the purpose of dealing with him for his expectations. The answer admits, that the whole transaction was kept a secret from the master, which was from the apprehension that he might alter his

(91) 2 *Atk.* 535.

(92) 4 *Bur.* 2225. *Wilm.* 384.

his intention of bounty to the Plaintiff. It is also admitted, and was proved at the trial, that the bond was not signed, sealed, and delivered, in the presence of the witnesses; who signed to a blank paper. The jury however presumed delivery. It is also admitted, that this apprentice had very inconsiderable property beyond his expectations from his master; upon which therefore this bond was to operate. His salary according to the answer was but 190*l.* a-year; and her whole income was her wages of 12*l.* a-year. The ground of relief is, that the transaction is in nature of a fraud upon the person, from whom the bounty is to come. Suppose, the Master had discovered this transaction; and had imposed a condition upon the Plaintiff, that he should not marry the Defendant. The principle is the same as in the case of parent and child.

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2dly, At least this sum of 2000*l.* must be considered as a penalty, against which the Court will relieve; and cannot be looked at as liquidated damages. *Sloman v. Walter* (93). *Hardy v. Martin* (94). In *Tall v. Ryland* (95) the Court refused to interfere merely on account of the small amount. The relative situation and means of these persons are perfectly inconsistent with the notion, that this could be intended as stipulated damages. Suppose, in the interval any particular circumstance had occurred: for instance, she might afterwards have led a most profligate life: would this Court in that case have permitted the whole sum to be recovered? Her conduct, though not entitling him to complete exoneration, might have left him subject only to nominal damages. This sum therefore can be considered only as security for damages, not as the damages themselves.

Mr.

(93) 1 *Bro. C. C.* 418.

Mr. Romilly from his own

(94) 1 *Bro. C. C.* 419, n. note.

7th May, 1783. Stated by (95) 1 *Ch. Cas.* 183.

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Mr. *Richards* and Mr. *Wingfield*, for the Defendant.

Under the circumstances of this Plaintiff's conduct, deceiving the Defendant, holding out to her this expectation even after his marriage with another woman, he has no claim to relief against this verdict: two applications to the Court of Law, impeaching it, having failed after great consideration. This cannot be compared to *Woodhouse v. Shipley*: a daughter, entering into such a stipulation without her father's consent, to her own disparagement. That was a fraud upon the parent. These parties were both *sui juris*; and their condition not unequal. The amount of the sum was for their consideration, the subject of contract. His expectations from his Master did not place him in the relation of a child to a parent. The engagement to marry is founded upon an expectation of fortune, that will make it convenient. The transaction in *Woodhouse v. Shipley* could not stand; as being against the policy of the law: withdrawing a daughter from the protection of her father. The objection from want of reciprocity here was a question at law; and has been deliberately determined. The instrument itself imports consideration; and is valid at law; and under the circumstances there is no policy against it in equity. *Key v. Bradshaw* (96) turned, as Lord *Hardwicke* observes, upon the inequality of circumstances and the danger of such transactions in families. In *Lowe v. Peers* the contract was not to marry any one else: a restraint therefore upon marriage.

2dly, This is to be considered, not as a bond with a penalty, but as an engagement, if he should not marry the Defendant, to pay her this sum of money. The distinction between a penalty and stipulated damages was much discussed in the Court of Common Pleas in the

the case of *Astley v. Weldon* (97); and your Lordship declared, you did not understand the principle of *Hardy v. Martin*. In *Fletcher v. Dyche* (98) the weekly sum stipulated was considered as liquidated damages. It might have been impossible for the Plaintiff to have paid this or any sum: but he might have performed his engagement; and under the circumstances of his conduct he deserves no assistance from a Court of Equity. In *Atkins v. Farr* (99) the bond was supported; and the whole sum decreed.

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Mr. Romilly, in Reply.


This cannot in principle be distinguished from *Woodhouse v. Shiptley*; which was the case of a woman, *sui juris*, at the age of twenty-six. Lord Hardwicke meant only, that she was not *sui juris* with reference to property; that she was dealing for her expectation. There can be no doubt, that this transaction is in opposition to every principle of good policy. Marriage ought to be contracted in consideration of the personal qualities of the persons contracting. A variety of changes might have taken place in their circumstances. This woman might have become a lunatic; and during a lucid interval might have claimed the performance of this engagement. As to the other question, the answer admits this to be a penalty; representing the conversation, that he would give her a bond as a security for the performance of his promise; desiring her to fix the amount of the bond; and she named 2000*l*. She cannot represent that as liquidated damages; taking in all the contingencies, that might have happened, all possible alterations in her situation and his. *Rolfe v. Peterson* (100) was decided upon this; that on the face of the agreement it appeared, that it was, not a penalty, but an agreement for the payment

(97) 2 *Bos. & Pal.* 346.

(99) 1 *Atk.* 287.

(98) 2 *Term Rep.* 32.

(100) 6 *Bro. P. C.* 470.

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payment of a particular sum. Lord *Rosslyn* in *Hardy v. Martin* (1) said, Lord *Camden* took it to be the case of a penalty; and the ground of the appeal was, that it was a contract, that if the land was used for one purpose, one rent should be paid, if for another purpose, another rent; and that contract a Court of Equity had no power to moderate.

*The Lord* CHANCELLOR.

The question at present is only, whether the circumstances, as they now stand, furnish sufficient doubt to authorize the Court to pause, before it permits execution to be taken upon a bond, given under those circumstances; reserving to the hearing the grave and serious question, Whether such an instrument can be permitted to stand. The case has been represented in two views: first, as a bond against policy, and to be relieved against upon the principle in *Woodhouse v. Shipley*; next, as an instrument, binding a person in a penalty: that penalty to be considered as intended only to secure such damages, as ought to be recovered; upon which it is insisted, that execution is not to be permitted upon the judgment; but that it is to be considered only as security for the result of an issue "*Quantum damnificatus*." According to a note of the Chief Baron's judgment two grounds were laid upon the motion for a new trial: first, that the instrument had not been stamped: secondly, that it was not executed in the regular mode: viz. the witnesses knew nothing of the sealing and signature; and the Chief Baron states, that he considers it, as if there were no witnesses; and in that case, the hand-writing being proved, it would be good at law. Upon the face of the instrument I think, it never was intended to be sealed. I collect from it, that

(1) Stated by Mr. *Romilly* from his own note.

that both these persons knew, the Plaintiff had expectations from *Tovery*; for they contract with reference to a marriage, not to take place till after his decease. In that respect it resembles *Woodhouse v. Shipley*. The instrument is most improvident. There is no doubt, they were dealing with reference to the expectations from *Tovery*: yet, as it is drawn, if nothing had been left to the Plaintiff by *Tovery*, if the contract was under such circumstances, that no jury would have given a farthing damages, if, though proper at first, it became improper on account of any change in her, yet the Plaintiff must according to the instrument have paid, if not in his purse, in his person. There is no mutuality whatsoever in this; for she is bound to nothing. Therefore, if her expectation had been disappointed, as well as his, and her circumstances improved, she might have said, as *Tovery* had left him nothing, and she had become a person of substance, she was not bound to marry him. Such an engagement has no providence; and it is open to every imputation, that can belong to it, and that is cast upon it in the general reasoning of Lord *Hardwicke*. There is a passage in the answer, that might possibly form the ground for an application to reform the contract; if it was not drawn up with a penalty; for, when they talk over the mode of performing the engagement, he is so improvident as to tell her, the extent of the sum shall be measured by her will and pleasure. By that passage it appears clearly intended to be a penalty, if it is not; and it may be very difficult, attending to the actual form, to say, it is so.

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In *Woodhouse v. Shipley* Lord *Hardwicke* goes through all the cases; in which I shall not follow him farther than by making a few observations. The case of *Atkins v. Farr* was founded upon the doctrine of *præmium pudoris*: also the condition was to marry in a year from the

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the date of the bond. The case in *Vernon* had a strong ground for the interference of a Court of Equity; for, if a young lady of quality is permitted to marry a servant, and he to marry her, an action for breach of promise of marriage would lie by either; and, if a bond was given, upon which consideration is not necessary, I do not know, that the Law could make any thing of it: yet it was thought, there was a sort of aristocratic principle; upon which relief might be given upon the inequality of circumstances, and upon a much better ground, the danger to families. That shews, the Court will relieve, where the Law will not. In *Woodhouse v. Shipley* the parties were *sui juris*: that is, as to the contract of marriage. The lady was of the age of 26. Her property did not exceed 500*l.*: in fact it was realized only to the amount of 340*l.* It is true, she was living in her father's house: but, notwithstanding that, still she might enter into any contract of marriage.

Actions would  
lie upon mutual promises  
of marriage.

There is no doubt, upon mutual promises actions would lie (2). It did not rest upon mutual promises: but she gave a bond. There could be no doubt, that the 600*l.* was a penalty; for it was given to secure a less sum. The Defendant upon the other hand agrees, that, if he shall not marry her after the decease of her father, she shall have all his property real and personal. The bargain was not very unequal. Lord *Hardwicke* does not deny, that a recovery might have been had at Law; but states the various grounds, upon which the Plaintiff was entitled to relief in Equity: first, that to permit such a bond to stand is against the policy of the Law; collecting, that, as the marriage was not to take place till after the decease of the parent, they were dealing upon expectations, which they must know, the parent, if informed, would probably disappoint; and considering, that

(2) *Cork v. Baker*, 1 *Str.* 34.

that the policy of the Law would not allow it to be kept a secret from those, standing in a natural, or any other, relation, raising fair expectations, that the party would be an object of the bounty of those persons; and Lord *Hardwicke* uses the phrase "parents or friends."

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If a person at the age of 26 could not enter into such an engagement, on the ground, that it was a fraud upon a parent, it is extremely difficult to say, a person of the age of 22 or 26 may enter into such an engagement; the contract on the face of it appearing to proceed upon an understanding between the parties, that it behoved them to postpone the execution of it, till the views they had could not be disappointed by coming to the knowledge of a third person, standing in *loco parentis* as to one. But Lord *Hardwicke* did not feel bold enough to put it upon that only. Another circumstance, to which he adverts in strong language, is, that at the death of the father the bond the man had executed was found in the man's possession. The answer stated, that the fact was so; but that the bond had been originally delivered to her, and she had placed it in his hands; not for the purpose of vacating the security; but to remain still effectual; and Lord *Hardwicke* says, that shews the great confidence she had in him; and concludes therefore, that she might not have acted advisedly in entering into the engagement; and his observation upon that applies to this case "if there was no mutual obligation, "there had been no colour to support this bond." In this case unquestionably there is no mutual obligation; not even a parol promise; upon which an action upon the case would lie (3): but certainly no such mutual obligation. If it was not by an instrument under seal, and nothing but a promise, a consideration must have been

Action on the  
 case upon a  
 parol promise  
 of marriage.

(3) *Cork v. Baker*, 1 Str. 34.


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been proved. If no action could have been brought before a distant period, and there had been no breach till then, the circumstances of the Defendant at that time must have been given in evidence; and he might have said, the sum of 2000*l.* would have been the fair measure of the damages, if *Tovery* had left him property, answering his expectations; but nothing had been left to him; and the jury might have regarded his circumstances at that time.

Lord *Hardwicke* then states, that the instrument is under a penalty; which in his opinion forms an objection. The 600*l.* was a penalty; but the 500*l.*, the sum to be recovered, could not be so described. In a substantial sense that must have been considered as liquidated damages. Yet Lord *Hardwicke* considered the circumstance of liquidating such a payment with reference to a contract of marriage as an additional ground, upon which a Court of Equity should look with suspicion at a contract, which he avowed he could not set aside, as actually fraudulent. Lord *Hardwicke* then proceeds to add small circumstances, that the bonds were executed in an ale-house; where she had no friend; that two strangers were called in to witness it; &c. In this case there were no witnesses.

The authority of Lord *Hardwicke*, attending to all the circumstances, decides, that this is a case, in which upon the first ground he takes it is due to considerations of great public magnitude to determine here, whether a bond, such as this, is to be enforced. Whether it ought to be enforced at Law I will not say; especially after a decision at Law. The Court of Exchequer seem to think it a case, in which there might be a recovery at Law, that would not prevent relief in Equity. Courts of Law have not till very lately taken upon themselves to canvass
 marriage

marriage brocage bonds, and such contracts; which have been constantly cut down in equity. I am of opinion upon this ground, there ought to be an injunction until the hearing. It is not necessary to discuss the other ground. It would be very difficult, attending to the form of this instrument, upon which there has been a recovery in an action of covenant, to consider this as a penalty: but the question would be, Whether, if by the improvidence of the party it is drawn up so as to be considered not with a penalty, this Court would not reform it in that respect; so as to make it with a penalty; and, if so, the Court would deal with it, as if it had been so framed originally.

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 v.
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The Injunction was ordered.

BAYLEY v. DE WALKIERS.

A MOTION was made, that certain persons in *London* may be at liberty to sign the answer of the Defendant; who was resident at *Brussels*; but had left in *England* a general power of attorney to act for him, and to appear, defend and compromise, suits, execute deeds, &c. It was not necessary, that his answer should be on oath; as he was merely a mortgagee, submitting to re-convey on receiving the remainder of his money.

The Lord CHANCELLOR said, it would be better to take the answer without signature; that they should be at liberty to file an answer, as the answer of this Defendant; the fact of the power of attorney being entered in the Order.

1805.
Feb. 23d.
 Answer of a Defendant, abroad, (not required to be on oath) ordered to be put in by a person, having a general power of attorney to defend suits, &c. without signature.

Mr.

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v.

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WALKIERS.

Mr. Thomson, in support of the Motion, objected, that an answer without oath requires signature.

The Lord CHANCELLOR.

An answer without oath, and every answer, generally, requires signature. But that was not the old rule; and I think it better to take the answer without signature under such circumstances, than to take the signature of another person under the pretence, that it is the signature of the Defendant.

Mr. Hart (*Amicus Curiae*.) referred to Sir Henry Gwillim's Case (4); observing, that his answer was taken without signature.

The Lord CHANCELLOR said, he recollected that; and Sir Henry Gwillim had left an authority to act for him.

The Order was made accordingly, that the answer should be taken without signature.

(4) *Ante*, Vol. VI, 285; see the note, 172.

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TARLETON v. DYER.

Feb. 23d.

After a joint
Answer by
husband and
wife, and
amendment of
the Bill, the

husband going abroad, the wife, being the material party, cannot be brought into contempt without a previous order upon her to answer separately.

Order accordingly for a Subpoena to her alone.

THE bill was filed for an account of transactions in the *West Indies*. One of the Defendants, who was the widow, executrix and residuary legatee, of one of the accounting parties, having married again, put in an answer

answer jointly with her husband. The bill was amended; after which the husband went abroad. The wife, being served with a subpoena to answer the amended bill, took no notice; upon which a motion was made for an attachment against her for her appearing to the amended bill, upon affidavit of service of the Subpoena, and, that her husband is out of the jurisdiction, and her Answer necessary (5).

1805.
TARLETON
v.
DYER.

The Lord CHANCELLOR.

My doubt is, whether upon the special circumstance, that the husband is out of the kingdom, you ought not to have got an order upon her to answer separately.

Mr. Trower, in support of the Motion.

There has been some dispute, whether it is necessary to serve a subpoena upon an amended bill. According to the late cases in *Mr. Dicken's* notes (6) and *Angerstein v. Clarke* (7) it is not: the amended bill being considered

(5) The affidavit stated, that the Plaintiff is informed and believes, that the Defendant *Mark Dyer* previous to or soon after the amended bill filed left *England* for the *West Indies*; and has not returned; upon which account the Plaintiff would not be able to serve him: but he is only a nominal Defendant, as having married *Mary Dyer*; who is alone acquainted with the matters in the original and amended bills, and is the most material Defendant: her late husband having corresponded with her upon his

affairs, as appears by her answer to the original bill; and the Plaintiff is informed by his Solicitor, that she had been served with a Subpoena to appear and answer the amended bill; and on the 16th of *November* last notwithstanding such service she refused to appear, &c.; whereby the Plaintiff is deprived of the benefit of her Answer; which he conceives to be material.

(6) *Hail v. Camp, Bagshaw v. Batson*, 1 *Dick.* 108, 113.

(7) *Anto*, Vol. I, 250. *Skeffington v. —*, IV, 66.

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 v.  
 DYER.

sidered as the original bill. But Mr. *Hollist* is of opinion, that the subpoena is necessary; and for a good reason; for, if the amendment is made in the Vacation, how is the Defendant to know, that there is an amendment? *Bell v. Hyde* (8).

Mr. *Romilly* (*Amicus Curiae*) observed, that, where there is not a new engrossment, the Plaintiff undertakes to amend the Defendant's copy; and that gives him notice.

*The Lord CHANCELLOR.*

[ \*444 ] This will not vary the case. You cannot bring her into contempt for not answering the amended bill, unless • you have a previous Order, that she shall answer separately. Upon the affidavit I have no hesitation to order, that a Subpoena shall be served on her alone.

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The Order was, that service of Subpoena to appear to and answer the amended bill upon the Defendant *Mary*, the wife of the Defendant *Mark Dyer*, be deemed good service upon the Defendant *Mary Dyer*.

(8) *Pre. Ch.* 328.

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1805.  
*Feb. 19th,*  
*21st, 26th.*  
 Defendant  
 having ap-  
 plied, and  
 obtained an  
 Order for  
 time to an-  
 swer, cannot  
 put in an An-  
 swer and Demurrer without a special case.

TAYLOR v. MILNER.

THE bill stated, that the Plaintiff was by the Defendant *Milner* introduced to a young lady, his ward, another Defendant (*Sarah Pyke*); in order that the Plaintiff might pay his addresses to her; that the Plaintiff's proposals were accepted by her; that mutual promises of marriage

As the Demurrer, being coupled with an Answer, could not be taken off the File, it was moved to be expunged, or over-ruled.

marriage passed between them; and a memorandum of the terms of the settlement agreed to was drawn up by *Milner*, and signed by both parties and also by *Milner*; that a settlement was prepared accordingly; and a day was fixed for the marriage; but it was prevented by *Milner*, in collusion with the third Defendant *Wheeler*; with a view to bring about a marriage between the Plaintiff and another woman; of whom *Wheeler* was a creditor; that he might get his debt paid by the Plaintiff; and charging improper intentions in other respects; and that the Plaintiff intends to bring actions against the Defendants. The bill prayed a discovery, to enable him to bring actions against the Defendants.

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TAYLOR  
v.  
MILNER.

The Defendant *Wheeler* on the 12th of *December*, 1804, obtained an Order for a month's time to answer the bill. On the 19th of *January*, 1805, he obtained another Order for three weeks farther time to answer the bill; stating, that this Order is to be peremptory. After that he filed a demurrer and answer.

A motion was made on behalf of the Plaintiff, that the demurrer filed by the Defendant may be expunged or over-ruled for irregularity.

Mr. *Romilly* and Mr. *Hall*, in support of the Motion.

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The Defendant is clearly irregular. *Penn v. Lord Baltimore* (9). *Kenrick v. Clayton* (10). In *St. Didier v. Lord Huntingfield* (11) a Defendant, who had obtained Orders for time to answer, applied for liberty to demur: and your Lordship refused the motion with costs. The practice is clearly, that, where a Defendant has time to

(9) 1 *Dick.* 273.

(11) In *Chancery*, 23d

(10) 2 *Bro. C. C.* 214. *March*, 1803, post.

2 *Dick.* 635.

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to answer only, he can put in only an answer or a plea; either (12) of which is a compliance with the Order: but a demurrer insists, that the Defendant is not bound to make any answer. In *Abraham v. Dodson* (13) Lord *Hardwicke* held, that, where the bill is for discovery only, the Defendant cannot answer to part, and demur to part.

Mr. *Richards* and Mr. *Johnson*, for the Defendant.

This application ought to be, not in the terms of this motion, that the demurrer may be expunged or overruled; but, that it may be taken off the file. This is a demurrer to so much of the bill as seeks to subject this Defendant to something so much in the nature of penalty, that the Court will not compel him to answer; calling upon the Defendant to give an account of his transactions with the other Defendant, in order to lay the foundation of actions, as the bill alleges, against all the Defendants; charging the Defendant *Pyke* with a breach of promise of marriage, and the other Defendants with collusion. Consider, what might be the consequence, if the Defendant was charged with a felony, of such strict practice. The Order expresses time to answer only from a mere slip of the Solicitor, in not instructing Counsel to move for time to plead, answer, or demur. But it is sufficient to ask for time to answer; and the Register draws the order according to the regular course.

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Mr. *Romilly*, in reply, observed, that the motion could not be to have the demurrer taken off the File; as it was a demurrer and Answer (14).

The

(12) See the note to *Kenrick v. Clayton*, 2 Bro. C. C. 214. Post, *De Minckwitz v. Udney*, Vol. XVI, 355.

(13) 2 Atk. 157.

(14) Ante, *Lansdown v. Elderton*, Vol. VIII, 526:

but in *Mann v. King*, post, XVIII, 297, the Demurrer and Answer was taken off the File. So in *Curzon v. De La Zouch*, 1 Swanst. 485; and see the note, 193.

The *Register* stated, that the practice of the office is to draw the Order according to the written instructions (15).

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The Lord CHANCELLOR.

The reason, that upon an application for time to answer the Court would not give leave to demur alone, was founded upon some notion, that in a reasonable time the Counsel saw the bill; and determined without asking the Court, whether the case was proper for a demurrer. The time is but short; and when it was settled, that a mere denial of combination does not answer the exception, not to demur alone(16), it frequently happened, that a Defendant got into difficulty by slipping the time. The rule is, that if you ask for time to plead, answer, or demur, you undertake to answer a little more than the charge of combination; but, if you ask only time to answer, you must answer(17); upon the same ground; that the Court understands, that Counsel has been advised with. We know, that in fact the reason of giving those instructions is, that the Counsel has not seen the bill. Let this motion stand over; and the Defendant may give any notice of motion he may be advised to the Plaintiff.

A cross motion was made, that the Defendant *Wheeler* may be at liberty to take the demurrer and answer off the file, and to file it again; or, as it was agreed to be taken, that it should continue on the file. This motion was supported upon the same grounds, on which the other was resisted: viz. that the Order was shortly drawn by the inad-

[447]
Feb. 21st.

(15) 1 *Ves. & Bea.* 186. note, 527. *Lee v. Pascal*,

(16) *Lansdown v. Elderton*, 1 *Bro. C. C.* 78.

ante, Vol. VIII, 526, and the

(17) See the note in the next page.

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inadvertence of the Solicitor; and it would be hard to bind the Defendant; as the Plaintiff could sustain no injury; and according to *Kenrick v. Clayton* leave to demur may be given upon a special case; which upon looking at the record this appears to be.

Mr. *Romilly* and Mr. *Hall* insisted upon the regular practice; and that this motion should be refused, and the original motion granted, with costs.

*The Lord CHANCELLOR.*

Order for time to plead, answer, or demur, must be on condition of not demurring alone; and the mere denial of combination is not an Answer within that description.

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Upon the principle, on which this motion is argued, it appears to me, that a departure from the practice is insisted upon in this instance on a ground, that would destroy all practice. The rule as to these orders for time is, that, where the Defendant means to demur only. he must do that without asking time; unless a very special ground is laid. If he asks time, he may ask for time to answer only, or for time to plead, answer, or demur: but, if he applies for that order, he cannot demur alone. The Court has therefore as to that imposed upon him the necessity of such timely attention to the case, as will enable those, who are to advise him, to determine, whether the proceeding to be taken shall be by a demurrer in the first instance, or not. I remain of the opinion I expressed; with reference to which I never had any doubt. I always understood the practice to be, that, where the application is for time to answer, without more, the general rule is, that the Defendant is bound to answer(18); and that it was so settled, that, if one order had been made for time to answer, he could not have another order for time to plead, answer, or demur, not demurring alone; for the first

\*  
 (18) *Bruce v. Allen*, 1 *Madd.* compliance with this rule:  
 558. *Curzon v. De La Zouch*, Post, *De Minckwitz v. Udney*,  
 1 *Straust.* 185. A plea is a Vol. XVI, 355.

first order is an admission by the Defendant, that the case calls for an answer, and an answer only (19). As to the latter species of order, there is a great inconvenience in many cases; for it has been decided, that the denial of combination is not a compliance with the terms of that order, and an answer within the exception, if the bill is of such a nature, that the Defendant cannot answer to any fact but by running counter to all the rest, yet, whatever may be the inconvenience, according to the practice he must answer (20). There may be a special case for dispensing with the practice (21): but in this instance the application rests upon nothing but the fact, that the practice has not been followed. Upon this principle there is no reason, if three orders for time had been obtained, why it might not be said, the Counsel was so instructed, and the client did not know, he could not demur after obtaining three orders; and the Counsel then found it to be a case proper for a demurrer. The argument would be the same: where is the injury; where the delay; for if the demurrer ought not to hold, they will comply with the third order; and the Plaintiff will be in the same or a better situation; for, if the demurrer is good, the Court may dispose of his case without going farther. But there is no instance of such a motion upon the mere ground, that the Solicitor was not aware, that it was better to have laid the papers before Counsel, which the practice expects him to do previously to any application; and the Counsel therefore having received instructions for the ordinary motions for time, was at last furnished with instructions, shewing, that he ought not to have made the application; that the practice therefore is to be dispensed with for no other reason but that it was not observed.

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As ...

(19) See the note in the preceding page. 2 *Ves. & Bea.* 118, 121.

(20) See *Robinson v. Thompson, Wetherhead v. Blackburn,* 556. (21) *Bruce v. Allen*, 1 *Madd.*



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As to the extreme case, that has been put of a charge of felony, it might be proper to pause upon that. But if the rule is to be, not, that the Solicitor shall instruct Counsel, so as to enable him to determine what is advisable, but, that he shall take no step within the time the Court gives him to say, what is the step he wants, it leads to this; that in any period of the time, that elapses between the issuing of the *Subpœna* and the answer, including the three orders for time, the Court is to be called upon to look at the nature of the case, and determine upon that, whether the practice is to be applied; or dispensed with. The instructions being to move for time to answer merely, the Register acted right in not taking upon himself to give that leave, which the Court had not given, and the party had not asked. The Solicitor was distinctly informed by the first Order, that the time given was to answer only. If that was from mistake, the application should have been made then. But a second Order was obtained for time to answer only; and then an application is made to treat both those Orders as a nullity, for no other reason but that they have been obtained. Certainly there is important matter upon the record: but I am afraid to lay down a principle, requiring the Court to look into the record in every instance, and on the ground of negligence to dispense with the practice.

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Mr. *Richards* said, many practitioners thought, an answer and demurrer might be put in under an Order for time to answer: but he conceived the practice to be otherwise.

Feb. 26th.

*The Lord* CHANCELLOR.

I cannot change my opinion. The cross motion therefore cannot be granted. But, where there has been this common error, I am unwilling to give costs. Reserve the costs of both applications.

[ \*450 ]

GARLICK v. PEARSON.

1805.

Feb. 28th.

March 1st.

**I**N *Michaelmas* Term an action was brought for 400*l.*, the balance of an account stated. The declaration was delivered upon the 13th of *January* following. Upon the 13th of *February*, a plea having been put in, the bill was filed; praying an injunction and account. The action stood for trial at the next Assizes for *York*: the Commission day being the 9th of *March*.

Plaintiff, entitled to move for the common Injunction to stay Execution for want of an Answer, cannot in the first instance move for the special Injunction to stay Trial.

Mr. *W. Agar*, for the Plaintiff, moved for an injunction to stay trial; stating, that he had not obtained the common injunction for want of an answer; and alleging, that according to the practice of the Court of Exchequer it is not necessary to obtain the common injunction (22); that, if the Plaintiff is entitled to the common injunction, it is reasonable, he should have an injunction to stay trial; and the expence of two motions is avoided. He cited *Nicol v. Verelst* (23).

Mr. *Romilly*, Mr. *Johnson*, and Mr. *Raithby*, for the Defendant.

The delay in this case is gross: but the objection to this motion stands upon the practice; which is well established. There have been many such applications; and generally, as this is, at the last Seal, preceding the Assizes, at which the action is to be tried; the real \*object being to delay the trial to the following Assizes. It has been lately refused by your Lordship; as it was by Lord *Thurlow* in *Wright v. Braine* (24). According to the practice an injunction must have been obtained at a preceding

[ \* 451 ]

(22) See *Nelthorpe v. Law*, instance. 2 *Ves. & Bea.* 41; post, Vol. XIII, 323, as to and the note, post, 452.  
the practice in the Court of (23) 7 *Bro. P. C.* 245.  
*Exchequer*; where the Injunction stays trial in the first (24) 3 *Bro. C. C.* 87.

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GARLICK

v.

PEARSON.

preceding Seal or day in Term; and afterwards another application is made to extend it. The Plaintiff cannot want such an Order as this; for in the common course, he will either obtain the discovery he wants, or put the Defendant in default, entitling him to make this application.

*The Lord CHANCELLOR.*

The case of *Nicol v. Verelst* has no application to this subject; for it goes no farther than to establish, that in a certain state of the case you may move for an injunction to stay trial: but that was after the answers came in; and it does not apply to the question, whether, if an injunction can be obtained upon having craved a *dedimus*, the Court will stay trial at the same Seal. The case of *Wright v. Braine* is not answered; for the meaning must have been, that you cannot move upon the same day for the common injunction, for want of an answer, and for the special injunction, to stay trial. Unless some instance is produced of an injunction on motion, for want of an answer, and an Order at the same Seal, extending it to stay trial, the current of practice being the other way, I will not make such a precedent. With reference to the circumstances of this case, it is always the fault of the Plaintiff in Equity, if he is pushed in time; for the moment a step is taken at Law, if he wants discovery, he must be aware of it immediately; and it can hardly ever happen, that the bill is delayed, except from choice. The course as to injunctions in this Court is, that, if the motion is made before declaration, you get an injunction to stay every thing: if after declaration, the injunction stays execution only, not trial (25). If the practice is, that

[ \*452 ]  
Injunction in the Court of Chancery stays all proceedings, if before Declaration; if after, it stays Execution only.

(25) Post, *Bullen v. Ovey*, Vol. XVI, 141. XVIII, 488. The Injunction is extended to stay trial upon a slight general affidavit: *Farrar v. Lewis*,  
*Mills v. Cobby*, 1 Mer. 3.

that the two motions cannot be made upon the same day; the Defendant may reason thus; that he has so many days to answer; and there must be so many days, before the trial can take place. He will therefore take more time, as the only inconvenience can be staying execution, not trial; and between the two motions his answer will come in, and he will get rid of the inconvenience of staying execution. The effect of granting this application would, therefore, be a surprise upon the Defendant, operating the utmost injustice; for his objection would be, that, if he had known the effect of not putting in his answer sooner, it should have come in. The Defendant would thus be deprived of the benefit of that diligence, that would have prevented your getting the first Order; upon your right to which you now attempt to get the second Order, of which there are frequent instances; where the bill is filed just before the trial at the Summer Assizes; and by great exertion the answer is put in within the four days.

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Lord *Thurlow's* Order went upon these principles; and it is much safer to abide by them. As to the suggestion, that an injunction might be obtained by petition at the *Rolls*, there is an express Order, very ancient,

Ancient Order, that an Injunction shall not be obtained, except by Motion in open Court.

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| <p><i>Lewis</i>, 2 <i>Dick.</i> 729. <i>Jones v.</i><br/>—, ante, Vol. VIII, 46.<br/>Post, <i>Nelthorpe v. Law</i>, XIII,<br/>323. <i>Partington v. Hobson</i>,<br/>XVI, 220; formerly, that the<br/>Plaintiff believes he cannot<br/>safely go to trial until the An-<br/>swer; to which he has been<br/>since required to add, that it<br/>will give discovery material<br/>to his defence: <i>Appleyard v.</i><br/><i>Seton</i>, XVI, 223. <i>White v.</i></p> | <p><i>Steinwacks</i>, XIX, 83, 376, 7.<br/><i>Bowden v. Hodge</i>, 2 <i>Swanst.</i><br/>258. <i>Taylor v. Leigh</i>, 2 <i>Jac. &amp;</i><br/><i>Walk.</i> 388. Breach of Injunc-<br/>tion by proceeding against<br/>Bail: post, <i>Leonard v. Attwell</i>,<br/>Vol. XVII, 385. 1 <i>Ves. &amp;</i><br/><i>Bea.</i> 19. Order, extending<br/>Injunction to stay trial im-<br/>mediately before the Assizes<br/>refused: <i>Field v. Beaumont</i>,<br/>3 <i>Madd.</i> 102. 1 <i>Swanst.</i> 204.</p> |
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cient, that an injunction shall not be obtained, except by motion in open Court; shewing an anxiety to prevent surprise. I disavow going upon any circumstances in this case: but, if the action was brought in *January*, it is hard upon the party, who has been allowed to prepare for trial ever since that time, till the bill was filed, that no motion of this kind is made, until the Order must of necessity put an end to the object of going to trial; and it is difficult to say, why this bill should pray relief, as it does by praying an account, if the trial of this action can be very useful.

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No Order was made.

ROLLS.

1805.

Feb. 25th.

March 4th.

## STACKHOUSE v. BARNSTON.

Power by marriage settlement to the husband to charge not confined to the immediately preceding limitation of

the reversion to him; but held to over-reach all the prior limitations. Construction of a charge by Will, if the Reversion should never fall to the testator: viz. if it should not come to him personally, in his life: the charge therefore ineffectual; though the Reversion came to his heir.

Equitable charge on real estate not barred by lapse of time without demand, though considerable; and though at length brought forward under circumstances not favourable, yet not equivalent to, or affording a presumption of, a release. Account of the interest against a tenant for life; not limited to six years.

Whether a charge by Will for payment of debts revives a debt, barred by the Statute of Limitations. Qu.

ders; remainder as to certain premises, of the yearly value of 200*l.* 4*s.* 8*d.*, to the use of *Ann Gregory* for life, for her jointure, and in lieu of dower; and as to all the other premises to the use of trustees for ninety-nine years, if she should so long live, upon trust, in case she should survive him, to pay her a yearly annuity of 25*l.*; remainder as to all the premises to trustees, for 500 years; remainder to the first, and other sons of *Edward Acton* by *Ann Gregory*, in tail-male; remainder to Sir *Richard Acton* for life, and to his first and other sons in \* tail-male; remainder to the right heirs of *Edward Acton* for ever; subject, nevertheless, and charged and chargeable with the payment of any sum or sums of money, not exceeding 6000*l.*, in such manner and form, and to such person and persons, and for such uses, intents, and purposes, as *Edward Acton* by his Will, or any writing duly executed, should direct, limit, or appoint; and for want of such direction, &c. it was declared, that such sum and sums of money should cease, and not be raised out of the premises aforesaid.

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The trust of the term of 500 years was declared to be, that if *Ann Gregory* should have one or more child or children, other than an eldest or only son, by *Edward Acton*, living at the commencement of the term, then the trustees should raise the sum of 3000*l.* out of the rents and profits, or by sale or mortgage, for the portion and portions of such child or children, in such shares and proportions as *Edward Acton* should by Will or Deed appoint.

The issue of the marriage was one daughter, *Susannah*; who married *John Stackhouse*. In 1775, *Edward Acton* died. By his Will, dated the 20th of *March*, 1774, reciting, that the estates in settlement stood limited thereby after his decease, subject to an annuity out of other parts thereof, to his wife for life for her jointure,

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jointure, and upon failure of issue male of the marriage, to the use of Sir *Richard Acton* for life, with remainder to his first and other sons in tail-male, remainder to the testator's right heirs, subject and charged, in case the limitation to Sir *Richard Acton* and his issue-male should take place, with the payment of any sum of money, not exceeding 6000*l.* in such manner and form, &c. as the testator should by his last Will or any Deed duly executed direct, the testator by \*virtue of the power, so reserved to him thereby, charged all the said estates, in his marriage settlement mentioned, with the said sum of 6000*l.*; and reciting, that he was also entitled to the reversion in fee-simple, expectant upon the death of Sir *Richard Acton*, and failure of his issue-male, in the said premises and hereditaments, in his said marriage settlement mentioned, he gave, devised, and bequeathed, all the said estates and premises, and all other his manors, lands, &c. which he was seised of or entitled to in reversion, as well in the counties of *Hereford* and *Somerset*, as in the county of *Salop*, and all his personal estate whatever, subject to his debts and funeral expences, and the annuities and legacies after mentioned, to his wife *Ann Acton*, during her life, with remainder to his only daughter *Susannah Stackhouse* during her life; and after her decease, in case his said daughter should have two, and only two, sons, living at the time of her death, then he gave and bequeathed all his estates before mentioned to the younger of the said sons, and his heirs for ever: but in case the testator's daughter should leave more than two sons, living at the time of her death, then he gave and devised all his estates in possession or reversion in the county of *Salop*, to the above-mentioned second son of his daughter, and his heirs for ever, and all his estates in possession and reversion lying in the counties of *Hereford* and *Somerset*, to the third son of his daughter, and to his heirs for ever: but in case his said daughter should leave

leave only one son living at the time of her decease, then the testator gave all his said estates before mentioned, to such son and his heirs: upon the condition following, that if the testator's daughter should leave one daughter living at the time of her decease, then he directed, that the sum of 4000*l.* should be raised upon and out of the said estates; which he gave and bequeathed to the daughter of his said daughter, as an addition to \* the provision made for her as a younger child, by virtue of the settlement upon the marriage of *John Stackhouse* with his said daughter: but, in case his said daughter *Susannah* should die leaving one son only, at the time of her death, and two or more daughters, then he directed, that the sum of 1200*l.* should be raised out of the before mentioned estates; and he gave and bequeathed the said sum of 1200*l.* to be divided equally amongst such of the daughters of his said daughter as should attain twenty-one, or marry, as an additional provision; and in case his daughter should die without issue living at the time of her death, then he gave all his estates before mentioned to his own right heirs for ever.

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The testator then directed, that, if it should happen, that the reversion expectant upon the death of Sir *Richard Acton* and failure of issue-male of his body should never fall to him, the testator, the 6000*l.* by him charged upon his said estates, should stand limited and appointed to such persons, and in such proportions, as he had before devised his said real estates, excepting that in case his daughter should leave two younger sons, living at the time of his death, then he gave to the elder of such sons the sum of 4000*l.*, and to the younger 2000*l.*

The testator died, leaving his widow and daughter surviving. Sir *Richard Acton* took possession; subject to the jointure; and from the death of the widow, in  
1780,



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1780, received the whole rents till his death; and he died, without issue-male, in 1792; having, by his Will, created a charge for the payment of his debts. The sum of 3000*l.*, charged by the settlement, was paid to the Plaintiffs: 2000*l.* upon their marriage; and 1000*l.* advanced, in 1790, by Sir *Richard Acton*, upon the security of the trust term.

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The bill was filed in 1794 by *John* and *Susannah Stackhouse*, and their children; praying an account of what was due in respect of interest on the sum of 6000*l.*, accrued during the life of Sir *Richard Acton*: and that what should appear due should be paid out of his personal estate.

The Defendants, the personal representatives of Sir *Richard Acton*, by their answer insisted, that upon the death of *Edward Acton* without leaving issue-male the settled estates, except what was limited by way of jointure, descended under the limitations of the settlement to Sir *Richard Acton*, as tenant for life, subject to the rent-charge of 25*l.*, and the sum directed to be raised in the event of younger children; that the estates were not during the life of Sir *Richard Acton* subject to the sum of 6000*l.*; but that the power would operate only as a charge upon the ultimate reversion. They stated, that the rents were insufficient to satisfy the interest of 6000*l.*, together with the rent-charge of 25*l.*

The answer farther contended, that, if *Edward Acton* was enabled to affect the life estate of Sir *Richard Acton* by directing the 6000*l.* to be raised in his life, the power was not so executed: the true construction of the Will being to charge the 6000*l.* in the event of the death of Sir *Richard Acton*, leaving issue-male, and in no other case; and the charge therefore, being contingent

tingent during his life, could not carry interest. They stated circumstances, shewing at the date of the Will the improbability, that Sir *Richard Acton* would have issue-male. They also stated, that the claim to the 6000*l.* was expressly waived by letters; and they insisted upon the neglect and delay in not filing the bill during Sir *Richard Acton's* life, and the length of time, and Statute of limitations; contending, that at all events the account ought not to go back farther than six years.

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Mr. *Richards*, Mr. *Romilly*, and Mr. *Grimwood*, for the Plaintiffs, contended, that, this being an equitable charge, in the nature of a trust, the Statute of limitations did not apply; and cited *Aston v. Aston* (26), and *Wynn v. Williams* (27); but, supposing it barred, it was revived by the Will of Sir *Richard Acton*.


Mr. *Alexander* and Mr. *Whishaw*, for the Defendants.

The first question is, whether Mr. *Acton* has executed his power, so as to take effect immediately after the determination of his life-estate. The power, though very general, is different from absolute property. Upon the first part of the Will it is doubtful, whether, except in one case, that of creditors upon a deficiency of assets, a case, that does not arise, this would have effect as a charge; for it is essential to the execution of a power, that some person should be named, in whose favour it is to be executed; and by this Will no person is pointed out, except by the subsequent clause, in an event, that did not arise.

Next, this demand, supposing it arose, is barred by the effect of the length of time alone: which forms a positive rule; notwithstanding the phrase, used in some of

(26) 1 *Ves.* 264; see 267.

(27) *Ante*, Vol. V., 130.

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of the old cases, that for this purpose satisfaction or a release is presumed. In the case of a mortgagee, relying upon the 20 years, no one believes, that there was an actual release of the equity of redemption: and his plea admits the mortgage (28); so in the case of \* a judgment. The rule has been adopted by analogy to the Statute of Limitations. In *The Earl of Pomfret v. Lord Windsor* (29) the account of interest under such a charge as this upon real estate was restrained upon that ground: a much stronger case. This is the proper subject of a plea of the Statute of Limitations. As against Sir *Richard Acton* it is a mere personal demand; though arising out of real estate: a sort of *assumpsit*, raised in Equity against the tenant for life, to keep down the interest so long as he receives the rents and profits of that estate, upon which the principal sum is charged; and as under the limitations it is contingent, whether any one will ever be entitled to call for this capital sum of 6000*l.*, it may be compared to a legacy charged on land; upon which no interest is due, till the principal can be actually demanded. This equitable debt is as much within the operation of the Statute of Limitations as a legal debt: Equity following the Law upon that; and forming its rule by analogy.

3dly, As to the point, whether the demand, supposing it barred, has been revived by the charge for payment of debts in the Will of Sir *Richard Acton*, there is such a notion: but the question is still open. If it prevails, the effect will be to introduce all the mischief the Statute was intended to prevent. It stands upon *dicta* only, and there is no decision. It is generally supposed to have had its origin with Lord *Cooper*: but that is not so: it first arose in the time of the Lords Commissioners  
*Trevor,*

(28) *Edsell v. Buchanan*,      (29) 2 *Ves.* 472; see 487.  
 ante, Vol. II, 83.

*Trevor, Rawlinson, and Hutchins: Goston v. Mill* (30). The decision was, not simply upon the effect of the Law reviving the debt, but upon the supposed intention; *Staggers v. Welby* (31) was the case before Lord Cooper. *Blakeway v. The Earl of Strafford* (32) went to the House of Lords; and the decree was reversed; and it is stated in the report of that case and in *Jones v. The Earl of Strafford* (33); that upon those decisions nothing farther was done. *Legastick v. Cowne* (34) is a distinct authority. In *Lacan v. Briggs* (35) Lord Hardwicke expressed surprise, that such a rule had prevailed; and in *Oughterlony v. Earl Powis* (36); where he says, he should be under some difficulty to determine it after *Lord Strafford's Case*; which in some degree shakes the former determinations. There is no modern authority upon it; and the point is still open to discussion. Then upon principle such a rule cannot be sustained. The effect of the charge can be only to extend the fund, not to alter the nature of the debts to come upon the estate; which must be intended debts, recoverable at Law. Thus, under a charge debts by simple contract are not paid with interest; though in many cases a Jury would give it by way of damages. It was never held, that the common direction in the beginning of a Will to an executor, to pay all debts, would prevent the effect of the Statute of Limitations. Such a construction, increasing the charge upon a man's estate and family, in proportion to the honesty of his intention, to provide for the claims upon him, is against the policy of the Law. A plea of the Statute of Limitations cannot be represented as dishonest.

But,

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(30) 2 Vern. 141. Pre. page 89, Mr. Cor's note (1),  
Ch. 9. and Mr. Sanders's note (3).

(31) Anon. 1 Salk. 154. 3 Atk. 107.

(32) 2 P. Will. 373. 3 Bro. (34) Mas. 391.

P. C. 305. (35) 3 Atk. 105.

(33) 3 P. Will. 79; see (36) Amb. 231.

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But, supposing such a rule to prevail, it cannot apply to this case. In order to prevent the effect of the Statute of Limitations, or the analogy, the demand must be clear beyond dispute; and this rule can never apply, where the demand is doubtful: much less, where it has been waived. That was the ground taken by Lord *Hardwicke* in *Lacon v. Briggs*. The Plaintiff forbore to call for this interest in the life of Sir *Richard Acton*. His laches in not setting up that claim may have led to the destruction of vouchers, from which he may now derive considerable advantage. Every thing is to be presumed against a party so conducting himself. All the principles stated by Lord *Camden* in *Smith v. Clay* (37), against giving encouragement to stale demands in Equity, oppose this claim. Can it be supposed, believing this demand waived, and having acted upon that belief, he intended to revive it? At all events the account can only go back six years.

Mr. *Richards*, in Reply.

The condition, that the sum of 1000*l.* should be immediately raised, upon which the offer, which is called a waiver, was made, not having been performed, nothing was done, upon which the Plaintiff can be presumed to have given up the interest on the 6000*l.* The length of time, to create a bar, must afford a presumption of payment. That is the ground, on which the Court acts, presuming, if the party makes no demand, that it has been in some way satisfied. Thus, upon the perception of tithes an endowment is presumed: so a grant is presumed, &c. The Court does not in all cases refuse to relieve after 20 years; as in the instance of a legacy (38): but from the death of Mrs. *Acton* the  
time

(37) 3 *Bro. C. C.* 639, n. *Turberville*, Vol. II, 11; and the note, page 15.

(38) See ante, *Jones v.*

time is only 14 years. There can be no rule, except that, which presumes satisfaction or a release. The case of a mortgage is upon a different ground. In \* Law the estate is the estate of the mortgagee from the moment the condition is broken. The equity of redemption is a creature of this Court; which, giving the redemption, guards it by limiting the time; and takes the period of 20 years, not strictly by analogy to the Statute of Limitations, but, as the time fixed by that Statute as the limit to an ejectment, is thought reasonable, adopting that period. But that has no application to the case of an equitable charge.

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But, supposing the Statute of Limitations can be applied, that plea is dishonest, if the debt is due. The object of the Statute was, that persons should not be harassed with demands, that had been paid, but of which payment the vouchers were lost. It was never intended to bar a just debt. An executor is not bound by Law to plead the Statute; or chargeable with a devastavit, if he has omitted to do so. If this is not the true principle, why are the Courts of Law so anxious to revive a debt; taking it out of the Statute upon the most trifling acknowledgment? Upon the authorities the debt must be considered as revived.

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*The MASTER of the ROLLS.*

This bill is filed for the recovery of arrears of interest, accrued in the life of Sir *Richard Acton*, upon a sum of 6000*l.*, charged upon an estate, of which he was tenant for life. The questions are, first, whether the Plaintiffs ever had a right to this interest: 2dly, if they had, whether they are barred from their remedy, for the whole, or any part of it. With regard to the right, a question is raised by the pleadings, that does not appear to be much insisted upon in argument, whether  
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Mr. *Acton* was entitled by the terms of the settlement to *make this charge upon the estate. Upon the true construction the reservation of the right to charge must extend to the estate in all the limitations of it, and not be confined merely to the reversionary interest, limited to himself, over which he would have had a disposing power at all events.

Then, another question is, whether Mr. *Acton* has in fact made this charge by his Will. The doubt upon that arises from the clause at the end of the Will; directing, that, if it should happen, that the reversion, expectant upon the death of Sir *Richard Acton*, and failure of his issue male, should never fall to the testator, the 6000*l.* should stand limited to such persons, and in such proportions, as the estates, &c. It is said, the charge in the former part of the Will would remain without operation, unless some person is appointed to benefit by that charge; and here the only event, in which any particular persons are to take a benefit, is, that the estate should never come to the testator. It is said, if it ever comes to him, or any of his heirs, this contingency would not have happened: that is, the contingency, that it should never come to him; and that the only case, in which he meant to provide, that the 6000*l.* should go to his wife, his daughter, and the children of his daughter, is that, in which the estate should perpetually remain in the family of Sir *Richard Acton*. Clearly that it is not the intention, nor the true construction of the Will. In the former part he appears to consider the right to make this charge to depend upon the limitation to Sir *Richard Acton* and his issue male taking place. That limitation did take place; and the testator's conception was, that in that case he had a right to make the charge. What he meant by the expression, "if the reversion should never fall to him," is "if it should never fall to him personally;" for his object

was

was to make a provision for his family, by the settlement of the estate, in case the estate should be his at his death; by the settlement of the charge, if the estate should not be his at his death. In the event; that happened, therefore, the estate not coming to him, I am clearly of opinion, the change ought to take effect.

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It is then said, it is contingent, whether any one shall ever be entitled to call for this capital sum of 6000*l.*; and no interest is given upon it in the mean time; for it is contended, that the limitation of the real estate is so made, that in a given event it will remain undisposed of; and the 6000*l.* is limited in the same manner; and therefore the event, may happen, in which that will remain undisposed of. It is said, therefore, no person had a right to demand, that this sum of 6000*l.* should be raised; and, therefore, interest upon that sum, which might never be raised, is not personally due. According to the opinion I have expressed, the testator unquestionably could have made an absolute charge of that sum, to take place in all events. If he has made a contingent charge only, he has done less than his power enables him to do. He has disposed of the interest in the 6000*l.*; giving a life-interest in it to persons, *in esse*, and capable of taking it; his wife and daughter. If an application were made to have that 6000*l.* raised, so that it might be laid out to produce interest to them, how could that be opposed? If it was objected, that the event, in which it was to be raised, might never happen; they must at least consent to pay interest for it in the mean time; for, if they were neither to raise the capital, nor to pay interest out of the rents and profits, that would be to say, the execution of the power is bad in the extent, to which it has gone, because it has not gone the full length. But I am clearly of opinion, that in the extent, to which it has gone, it is good; for he might have

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given the absolute interest in the 6000*l.* in a given event, and interest upon it in the mean time. It is clear, therefore, the bequest of the interests for life to the testator's wife and daughter is a valid appointment; whether the 6000*l.* was ultimately to be raised, or not.

The question then is, whether upon any of the circumstances, that have taken place since the death of the testator, the right, thus created, has been barred. I own, when a demand is made at a period so distant from the time the right accrued, it is listened to not very favourably; especially considering, upon what ground the Plaintiffs themselves account for not coming sooner. They state by the bill, that they had prudential reasons for not making the demand, if their right was clear; and, if doubtful, for not entering into litigation upon the subject with Sir *Richard Acton*; the expectation of benefit to their family from him; and therefore they did not choose to agitate the question, or make a demand. That comes to this; that they were willing to let him suppose, the demand was not to be made upon him; for that is the only way, in which his favour was to be conciliated; for it would have been no favour to him to postpone the demand, and to make it afterwards against his assets. If he has died in the persuasion, that this demand was never to be made upon him, it is not made under favourable circumstances after his death. But that would not of itself be sufficient to bar a legal demand. The question is, if the demand existed in right, whether they had done such acts as preclude them from now making it; or, whether the length of time bars them from insisting upon their remedy. It must appear, that they have either released, or done something equivalent to a release; or, that they are prevented from recovering it by the application of a statutory bar, or a presumption from the length of time they have permitted to elapse, before they insisted upon their right.

It

It is said, there is a positive waiver of their demand, upon letters by Mr. *Stackhouse* to Sir *Richard Acton*. As to a waiver, it is difficult to say precisely, what is meant by that term, with reference to the legal effect. A waiver is nothing; unless it amount to a release. It is by a release, or something equivalent, only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not without consideration bar the right any more than at law accord without satisfaction would be a plea. An agreement for a composition will not prevent the creditor from suing, unless a fund has been provided, giving him some benefit, and creating some disadvantage to the other, so as to amount to a consideration. But here the waiver is not unconditional: Mr. *Stackhouse* said, there was a condition, upon which he was willing to waive any right, if any he had: viz. that Sir *Richard Acton* should consent to raise immediately 1000*l.*; to which Mrs. *Stackhouse* was entitled under the settlement. If that condition had been performed, however slight the consideration might have been, I do not know, that the Court would not consider it a sufficient foundation for a release, or what is equivalent to a release. But it does not appear, that the condition was performed; for according to all the information the Court has that 1000*l.* was not raised and paid for ten years afterwards.

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It is then insisted, that the Statute of Limitations is a bar to this demand. With regard to that Statute, though it does not apply to any equitable demand, yet equity adopts it; or at least takes the same limitation in cases, that are analogous to those, in which it applies

Though the Statute of Li-
[*467] mita-
tions
does not ap-
ply to any
equitable de-
mand, equity

takes the same limitation in cases analogous to those at law.

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No limitation  
 to a rent-  
 charge in law  
 or equity.  
 But the de-  
 mand may be  
 excluded by  
 presumption  
 from length  
 of time, and  
 acquiescence.

[ \*468 ]

at law. But in this case it does not seem to me, that there is any analogous case at law, in which the Statute of Limitations could operate as a bar. The nature of this demand, in one view of it, is interest upon a capital sum of 6000*l.* charged upon real estate; and in that view it is impossible to bar the interest, or a part of the interest, unless the capital is barred. In the case of a mortgage it is impossible to redeem except upon payment of all interest, if the principal be payable. In another view, supposing, there was no capital sum, of which this is to be considered as the interest, it is an annual sum, charged upon land, equal in amount to the interest of 6000*l.*; and then it is an equitable rent-charge. There is no Statute of Limitations to bar a legal rent-charge. Therefore in equity such a bar is never permitted to prevail. In *Collins v. Goodall* (39) it was held, that the Statute concerns only customary rents between landlord and tenant, and does not extend to any rent, that commences by grant, or, whereof the commencement may be shewn. In equity therefore that plea was over-ruled. There is a case in *Cowper* (40), in which an action was brought upon a distress for the recovery of a quit-rent: no demand of payment having been made for thirty-seven years. Baron *Eyre* was of opinion, that, though the claim of the Defendant was not barred by the Statute of Limitations, yet a non-payment and acquiescence for thirty-seven years was a sufficient ground to presume a release or extinguishment of the quit-rent; and left it to the jury to say, whether upon the evidence they would or would not presume, it was released or extinguished; and the jury found, it was. A new trial was granted: Lord *Mansfield* stating, that “there is no instance of setting up any length of time within the limitation fixed by the Statute as a bar to the demand; and in cases of quit-rents like the present, the

(39) 2 *Vern.* 235.

(40) *Eldridge v. Knott, Corp.* 214.

“ the reason of carrying back the limitation to the pe-  
 “ riod, fixed by the Statute, namely, fifty years, is the  
 “ stronger, because the consideration is so trifling; though,  
 “ if a real ground for supposing a release or extinguish-  
 “ ment appeared, the smallness of the claim would have  
 “ no weight. But in this case there is mere length  
 “ of time; which, barely as such, ought not to be  
 “ received as a bar; and, if so, the case stands with-  
 “ out a pretence for supposing a release or extinguish-  
 “ ment. Because, on the other hand, the exact time,  
 “ when the payment was first refused, is in proof; and  
 “ further the real and probable ground of such refusal  
 “ appears: namely, that the tenant had succeeded. in  
 “ an action between him and his lord; not that the  
 “ lord had released it by any conveyance, or the like;  
 “ and if so, it might be a good while, before the lord  
 “ might think proper to bring an action for half-a-  
 “ crown. Therefore I am of opinion, that upon the  
 “ evidence it ought not to have been left to a presump-  
 “ tion of law within a less time than the period fixed  
 “ by the Statute.”

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 ~~~~~  
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From *Aston v. Aston* (41) Lord *Hardwicke's* opinion is clear, that the Statute of Limitations does not in any degree apply to demands of this nature. He thought the other question fit to be considered; whether the transaction between the mother and son might not afford a presumption of a release to him; or be held collusive and fraudulent against the remainder-man. But it is clear, the mere length of time did not appear to him to operate as any bar to such a demand. In *The Earl of Pomfret v. Lord Windsor* (42) Lord *Hardwicke* carried back the interest upwards of 30 years; and the only reason for not going farther was a presumption, that the interest before had been applied in the maintenance of Lady *Pomfret*.

[* 469]

Then

(41) 1 *Ves.* 264; see 267.

(42) 2 *Ves.* 472; see 487.

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Account of
rents and pro-
fits limited to
six years [* 470]
by analogy to
legal limita-
tion.

Then the question, supposing the Statute not to apply by that sort of analogy, by which alone it applies to equitable demands, is, whether there is any such presumption from length of time, as ought to prevent the Plaintiff from recovering. I am clearly of opinion, that, though in cases of rents there is no Statute of Limitations at all applicable to such demands, yet from length of time presumptions may be raised, which may exclude the demand after long acquiescence. But here all presumption of release or payment is excluded; as the very ground, upon which the defence rests, is, that there never has been payment; and the demand was never intended to be made; insisting, the Plaintiff had given up all right to demand this rent-charge. There is no room therefore for presumption of payment or a release in any other way than as it is contended to be the effect of that negotiation with Sir *Richard Acton*. For the reasons I have given therefore, though with reluctance, I think these Plaintiffs entitled to recover this interest for the whole time, since Sir *Richard Acton* came to the estate. But it is harsh to insist upon one part of the demand: viz. the full interest of the 6000*l.* during the time the widow was entitled to part of the rents and profits for her jointure. I do not understand, that it is intended to insist on that. As to what is contended by the Defendants, that the account should be restrained to the last six years, that is very frequently done as to rents and profits (43): but still that is by analogy to the legal limitation: where the legal owner would be barred from an action for mesne profits for more than six years, the equitable owner being restrained in the account

(43) Ante, *Harwood v. Oglander*, Vol. VI, 199. VIII, 106, and the references in the notes, V, 439; VI, 215. *Petticard v. Prescott*, VII, 541.

account to the same period. But that does not apply to such a case as this.

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The Plaintiffs waiving the account during the life of the widow; an account was directed of the interest of the 6000*l.* at 4 *per cent.* from her death to the death of Sir *Richard Acton*.

ROLLS.

1805.

March 4th,

5th.

BURROWES v. LOCK.

EDWARD CARTWRIGHT, being entitled under a Will to the ninth part of the residue of the testator's personal estate, the whole of which had been distributed, except an outstanding debt, and being pressed by the Plaintiff for a debt due to him in his trade, as a baker, in consideration of 132*l.* executed an assignment to the Plaintiff of his share of what remained due on account of the residue, amounting to 288*l.* The expence of the transaction, amounting to 10*l.*, was also paid by the Plaintiff. Previously to this assignment the Plaintiff consulted *Lock*, the trustee of the fund; who represented *Cartwright* as being entitled to the full sum of 288*l.*; though he had ten years before created an incumbrance to the extent of a tenth part of the fund by an assignment to his brother.

A Witness to a deed must state the circumstances of the execution: the sealing and delivery. [*471]

In this case an objection, that he had stated merely that he was present at the execution, and was a subscribing witness, when the party executed and signed, did

Under these circumstances the bill was filed against *Cartwright*, and *Lock*, who admitted notice of the prior

incum-

not prevail, upon the circumstances; especially as the execution was not put in issue.

Contract executed, though the consideration was inadequate; not amounting to fraud; but without costs.

Trustee charged in respect of a misrepresentation to a purchaser; having notice; and alleging only, that he did not recollect the fact.

This is a more proper subject for equity than law: at least there is a concurrent jurisdiction.

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incumbrance, when he made the representation to the Plaintiff; alleging as an excuse, that he forgot the circumstance.

Mr. Romilly and *Mr. Hall*, for the Plaintiff.

Mr. Hollist and *Mr. W. Agar*, for the Defendant *Cartwright*, resisted the bill on the grounds of pressure upon distress, inadequacy of consideration, &c.

Mr. Leach and *Mr. Gregg*, for the Defendant *Lock*, insisted, that if any case could be made against him, it was the subject of an action; and, upon *Haycraft v. Creasy* (44), the ground of that action is fraud; which cannot be imputed.

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After the argument upon the merits, an objection was taken by the Defendant *Cartwright* to the proof of the deed. The deposition stated, that the deponent was present at the time of the execution; and was a subscribing witness to the deed at the time the Defendant executed and signed the same; that the name is of his own proper hand-writing; that he knows the hand-writing of the other witness; who with the deponent set and subscribed his name, &c. The objection was, that the deposition did not speak to the sealing and delivery of the deed.

For the Defendant, in support of the Objection.

The two essential circumstances, without which a deed cannot be valid, are the sealing and delivery; according to *Co. Litt.* (45), and *Leyfield's Case* (46); where it was held, that evidence of these facts must be given to the jury; who are to judge upon the matter of fact, whether

(44) 2 *East*, 92.(46) 10 *Co.* 88.(45) *Co. Lit.* 171 b.

whether the deed was so executed. The fact of sealing and delivery must be found: or the deed is not proved: and nothing short of that will do: *The Marchioness of Annandale v. Harris* (47). The witness is to state the facts, how the execution took place; not to tell the Court, what is an execution. A strong inference arises from his evading the question, whether it was sealed and delivered.

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Mr. *Romilly* and Mr. *Hall*, for the Plaintiff.

This objection is not put in issue. But, to consider it, the witness has sworn, he was present at the execution, and was a subscribing witness; and the attestation to the deed expresses it to have been "sealed and delivered," &c. in the usual way. Lord *Mansfield* and the other Judges would not admit an averment by a witness against his attestation: *Goodtitle v. Clayton* (48). In *Parke v. Mears* (49) the witness did not see the sealing and delivery; being in another room: but the party told him, he was executing; and the witness signed it by his desire: and that was held sufficient. What could this witness, according to his deposition, see, but the sealing and delivery? Lord Chief Justice *Holt* would not let a witness say, he did not see what he had subscribed: *Dayrell v. Glascock* (50).

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In the case in the Common Pleas the witness told what passed; and did not shelter himself under a general word. It does not apply to this. The witness stated the circumstances; and left the Court to decide. My hesitation in this case proceeds from an apprehension of giving any sanction to a deviation from the established mode of proving the execution of deeds. There is no instance,

(47) 2 *P. Will.* 432.

(49) 2 *Bor. & Pal.* 217.

(48) 4 *Burr.* 2224.

(50) *Skin.* 413.

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 v.  
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instance, in which witnesses have proved Deeds or Wills by a general phrase. They have always stated what actually passed; that the Deed was sealed and delivered, the Will signed, published, and declared, in the presence of the witness. Though in the particular case, and considering all the circumstances, I am not inclined to give way to such an objection, I am not to be understood to lay down a proposition, that in general a witness may prove the execution of a Deed or Will merely by saying, he saw it executed. But in this case nothing is put in issue but the fairness: not the execution itself. If the issue had been, whether the Deed was duly executed, or not, the Plaintiff would have been put upon his guard; and it would have been incumbent upon him to prove by distinct evidence, that it was duly executed. But, having no notice, that the execution of the Deed was meant to be contested, the witness contented himself with saying, it was executed in his presence. He says likewise, it was signed in his presence. Under those circumstances it would be a very rigid construction \* of his testimony to hold, that he did not mean to say, something more than signing took place. He says "executed and signed." What can that mean but that what appears upon the face of the attestation, sealing and delivery, took place? He attests the sealing and delivery. Those cases, in which it has been held, that a witness is not at liberty to contradict his attestation, go thus far; that, if there is the attestation, and he confesses himself to be the attesting witness, *prima facie* the presumption is, that what he has attested has taken place in his presence: if he denies that, other evidence is admissible, from circumstances; as, where there were no attesting witnesses; or, the person, whose attestation appears on the instrument, does not exist; proof of the hand-

[ \* 474 ]

Witness is not at liberty to contradict his attestation. In such a case other evidence, from circumstances, no attesting witnesses; as, where there is no Witness, or the person does not exist, sealing and delivery may be presumed from proof of the hand-writing.

the hand-writing.

hand-writing is sufficient to enable a jury to presume in such a case, that sealing and delivery took place; though the hand-writing alone does not of itself import sealing and delivery. This witness says, not only, that this is the signature of the Defendant, but, that it is a deed executed. I do not run a risk in this case, admitting this evidence; not meaning to determine, that in other cases there may not be a good objection to an attestation in these words.

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 LOCK.

As to the merits, I do not know, if fraud is out of the case, that I can set aside this contract, or refuse to act upon it, merely on the ground of inadequacy of price (51). But it is not quite so inadequate as it has been represented. The difference is not to be taken to be merely between the two sums. But after all the allowances, that can be made, I have no difficulty in believing, this was an inadequate bargain as to the price; that the Defendant did not get the price the property assigned was fairly worth. But, taking that to be so, \* the contract cannot be set aside within any principle this Court has ever acted upon: not even within the principle of the *Roman* law; requiring that the price should exceed half the value.

[ \*475 ]

Principle of  
 the *Roman*  
 Law as to con-  
 tracts, re-  
 quiring the  
 price to ex-  
 ceed half the  
 value.

The only remaining question is that with respect to the trustee. It is objected on his part, that this is a demand for damages: also, that this was not a wilful misrepresentation. As to the first point the demand is properly made in equity; and the *Lord Chancellor* in *Evans v. Bicknell* (52) declared, that the case of *Pasley v. Freeman* (53) and all others of that class were more fit for a Court

(51) See *Mortlock v. Bul-* See 182, 3, 5, 6; and the  
*lar*, ante, 292; and the note, note, 185.

Vol. VIII, 137.

(53) 3 *Term Rep.* 51.

(52) Ante, Vol. VI, 174.

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a Court of Equity than a Court of Law: but his Lordship was clearly of opinion, that at least there is a concurrent jurisdiction; and says, "It has occurred to me, "that that case upon the principles of many decisions "in this Court might have been maintained here; for it "is a very old head of equity; that if a representation "is made to another person, going to deal in a matter "of interest upon the faith of that representation, the "former shall make that representation good, if he "knows it to be false."

In this case the Plaintiff was going to deal with *Cartwright* upon a matter of interest; and applied to the person, best qualified to give information, the trustee, to know, what *Cartwright* was entitled to; who told the Plaintiff expressly, that *Cartwright* was entitled to 288*l.*; and had an undoubted right to make an assignment to that extent; knowing, that he had not a right to make such assignment; having previously agreed to give another person 10*l. per cent.* out of the fund. There is therefore a concurrence of all the circumstances, which the *Lord Chancellor* thinks requisite to raise the equity. The

[ \*476 ] \* excuse alleged by the trustee is, that, though he had received information of the fact, he did not at that time recollect it. But what can the Plaintiff do to make out a case of this kind, but shew, 1st, that the fact, as represented, is false: 2dly, that the person, making the representation, had a knowledge of a fact, contrary to it (54). The Plaintiff cannot dive into the secret recesses of his heart: so as to know, whether he did or did not recollect the fact; and it is no excuse to say, he did not recollect it. At least it was gross negligence to take upon him to aver positively and distinctly, that *Cartwright* was entitled to the whole fund, without giving himself the trouble to recollect, whether the fact was so or not; without

(54) Ante, Vol. VI, 182, 183,

without thinking upon the subject. This is a much stronger case than *Hobbs v. Norton* (55); and the negligence infinitely greater.

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v.  
LOCK.

*Lock* therefore must be answerable, in case *Cartwright* cannot answer the demand; and must first pay over to the Plaintiff the residue of the trust fund, deducting the 10*l. per cent.*: then *Cartwright* must make up the deficiency; and, if he fails, *Lock* must make it good. But under the circumstance of undervalue I will not give costs against *Cartwright*.

(55) 1 Vern. 136.



LEAKE v. LEAKE.

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1805.

March 1st,  
2d, 6th.


BY indentures of settlement, dated the 20th and 21st of January, 1734, previous to the marriage of settlement for *Stephen Martin Leake* and *Ann Powell*, in consideration of 1100*l.*, to which *Ann Powell* was then entitled, and of the death of the survivor of

the parents; with a proviso, that advancements should be in satisfaction, unless the contrary declared.

The father by Will, desiring, the settlement may be punctually complied with, made a residuary disposition of real and personal estates among the younger children; directing, that what they may have received in his life shall be brought into the account, so as to make all equal.

Construction upon the whole, that advancement in marriage, or otherwise, though not the grammatical construction, is within the proviso; and, equality being the object, an arrangement was made upon that principle.

One of the younger children, having become the eldest, and therefore owner of the estate, between the deaths of the parents, after advances received in satisfaction of the portion in the former character, to be considered a younger child in the account.

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of her expectations from her grandfather, the *manor of Thorpe* and estates in *Essex* were conveyed by the father of Mr. *Leake* to trustees; to the use of *Stephen Martin Leake* for life, without impeachment of waste; remainder to the trustees, to preserve contingent remainders; remainder to the intent, that *Ann Powell* should receive during her life an annuity of 100*l.*, and such farther annuity, as therein mentioned, in case her husband should have received any portion, sum or sums, out of the estate of her grand-father; and in case such portion, &c. should amount to 1000*l.*, then the said premises were to be from and immediately after his decease to the use of the said *Ann* for life, for her jointure, in bar of dower; and from and after the decease of the survivor, subject to the said annuities, to the use of the trustees, their executors, &c. for the term of 800 years; remainder to the use of the first and other sons in tail male; remainder to the trustees for another term of 1000 years; remainder to the use of the husband, his heirs and assigns.

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The trust of the term of 800 years was declared to be, that, in case there should be issue male of the said \**Stephen Martin Leake* and the said *Ann*, born in the lifetime of *Stephen Martin Leake*, or after his decease, and there should be one or more child or children of them, other than such, who should be their eldest son, and living at the time of the death of the survivor of the said *Stephen Martin Leake* and the said *Ann*, then the trustees should by sale or demise of all or any part of the said term, or otherwise, levy and raise the portion or portions thereafter mentioned and appointed for such child or children, and such yearly sum or sums for his, her, or their maintenance and education, until his, her, or their said portions should become respectively due or payable, as the trustees should think fit, not exceeding the interest or increase of the said portion or portions thereafter mentioned,

mentioned, &c. : the said portion or portions to be and to be paid in such proportion, manner, and form, as thereafter mentioned: that is to say, in case there should be but one such child, other than the eldest son, as aforesaid, then the sum of 1500*l.* should be levied and raised for the portion of such child; and if there should be two or more such children, other than the eldest son, as aforesaid, then the sum of 2000*l.* should be levied and raised for the portion of such two or more children, to be equally divided amongst them; and the portion or portions, share and shares, of such child or children, as aforesaid, as should be a son or sons, to be respectively payable and paid to him or them at his or their respective age or ages of 21 years; and the portion and portions, &c. of such as should be a daughter or daughters at her or their respective age or ages of 21 or days of marriage, which should first happen; and in case any of such children, other than the eldest son, as aforesaid, should happen to die, before his, her, or their, said portion or portions should be payable, as aforesaid, then the share, portion, or part, of such child or children, so dying, as aforesaid, should go unto, and be equally divided amongst, the survivors of such children, other than the eldest son, as aforesaid.

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The settlement then proceeded with a proviso, that, in case any child or children other than the eldest son as was or were thereinbefore intended to be provided for in case of there being issue male of *Stephen Martin Leake* and the said *Ann*, as aforesaid, or any daughter or daughters, who was or were thereinbefore intended to be provided for in case of failure of such issue male, should have been preferred in marriage in the life-time of the said *Stephen Martin Leake*, their father, and that he, the said *Stephen Martin Leake*, their father, should have bestowed or given any portion or portions with him, her, or them, upon such his, her, or their, marriage, or otherwise provided for him, her, or them, then such portion

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tion or portions or other provision as aforesaid should be accounted in full of the portion or portions thereinbefore intended to be levied or provided for him, her, or them, respectively, if equal in value thereto; or in part thereof, if not equal in value thereto; unless the said *Stephen Martin Leake* should declare the contrary thereof by any writing under his hand and seal, to be executed in the presence of two or more credible witnesses, or by his last Will and Testament in like manner to be executed and attested.

*Stephen Martin Leake* by his Will, dated the 21st of April, 1768, after directions as to his funeral, proceeded thus:

“As to my estate at *Thorpe*, and my dwelling-house  
 “and premises at *Mile-End* in the county of *Middlesex*,  
 “which are settled upon my wife and the issue of our  
 “marriage, it is my desire that the same be punctually  
 “complied with.”

[ 480 ]      Then, after giving specific articles and small pecuniary legacies to his two eldest sons and his wife, he made the following residuary disposition:

“*Item*; all other my estates whatsoever, both real and  
 “personal, I will to be sold; and the money arising  
 “thereby, after payment of my debts and funeral charges,  
 “to be divided among all my children other than my  
 “eldest son: so as the same with what they may have  
 “received respectively in my life-time as a portion and  
 “for placing them out in the world being brought to  
 “account may make them all equal.”

The testator afterwards made the following codicil, dated the 10th of *October*, 1771, not attested:

“Whereas by my marriage settlement 2000*l.* is to  
 “be raised for my younger children, to be equally divided  
 “amongst

“ amongst them; and in case I shall have bestowed any.  
 “ portion or otherwise upon any of them in my life-  
 “ time, the same is to be reckoned in whole or in part  
 “ of such share, unless I shall otherwise declare by my  
 “ Will; and whereas by my Will, dated the 21st of  
 “ *April*, 1768, I have directed my estate real and per-  
 “ sonal not otherwise disposed of to be sold, and the  
 “ money arising thereby to be divided amongst all my  
 “ children, except my eldest son, so as the same,  
 “ with what they shall have received respectively in my  
 “ life-time being brought to account may make them all  
 “ equal; to prevent any disputes as to the sums, that  
 “ each has received in my life-time, I declare the same  
 “ to be as follows; my daughter *Lee* 600*l.*: my son  
 “ *John* 100*l.*: my son *Thomas* 400*l.*: my son *Wil-*  
 “ *liam* 400*l.*: my son *Robert* 500*l.*; and it is my  
 “ Will, that the said sums and no more be deducted  
 “ from their respective shares: nevertheless to account  
 “ \* for such farther sums as they shall receive in my life-  
 “ time after the date hereof.”

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The testator died in *March* 1773, leaving his widow surviving. Her fortune, mentioned by the settlement to be in expectation; afterwards fell in; and she became entitled to the whole estate for her life. At the death of the testator he had nine children living. In pursuance of the Will the widow, being executrix, divided the residue of the estate in equal shares among the eight younger children; each child accounting for the sums advanced by the testator to the amount stated by the codicil; and the residue so divided amounted to about 740*l.* to each. The widow of the testator surrendered her life-estate in consideration of an annuity, from her eldest son, who took possession, and continued in possession till his death, in 1797; when the second son *John Martin Leake* became tenant-in-tail; and he suffered a recovery to the use of himself in fee. The

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mother died in 1802; at which time there were six children surviving. The five younger children filed the bill, against their brother *John Martin Leake*, claiming the 2000*l.* under the settlement. He insisted, that the provisions, made for them by the advancement of the father in his life and by his Will, were a satisfaction of the portions by the settlement.

*Mr. Romilly, Mr. Hollist, and Mr. Utterson, for the Plaintiffs.*

[ \* 482 ] This question depends upon very few words of the Will. The Plaintiffs cannot contend, that a provision by Will must not be considered a provision given in the life-time of the testator, after *Rickman v. Morgan* (56), and *Twisden v. Twisden* (57): though, if that distinction \* can be maintained, two of these children, *George and Ann*, had nothing advanced in the life of their father; and have no provision except by the Will. But by expressing his desire, that the settlement shall be punctually complied with, he has declared, that the provision by the Will shall not be a satisfaction: the effect being a declaration of intention, that all the provisions made by that settlement for the issue of the marriage shall take place, notwithstanding what he was then doing by his Will. No certain form of words is necessary: but any expression, from which can be collected the intention, that the provision by that instrument should not be taken in satisfaction, is sufficient. There can be only two constructions: either adopting that intention; or, that the settlement shall take effect; but not all its parts; that is, that they should not have the provision in the settlement, unless he should declare, the other provision should not be a satisfaction. Can it be conceived, that

(56) 1 Bro. C. C. 63. 2 Bro. Onslow v. Michell, post, C. C. 394. XVIII, 490. Golding v.

(57) Ante, Vol. IX, 413. Haverfield, 13 Pri. 593.

that he would take this extraordinary mode of expressing his intention to satisfy; taking notice of the settlement, and directing, that it shall be punctually complied with, for the mere purpose of intimating, that they should take nothing under it: in other instances, where he intends satisfaction, taking pains to express it; and, to remove all doubt, even ascertaining the sums? The codicil is not attested: but, if it can be looked at, the intention is clear, that the provision by the settlement should be taken in addition to that by the Will; which is much more than the sum of 2000*l*. Why otherwise should he take notice, that they are entitled under both; declaring the sums they have received, and which are to be brought into contribution? Many circumstances favour this construction: the date of the settlement, in 1734: the Will, many years afterwards: when the testator's property had considerably increased; but those circumstances certainly cannot be taken into consideration. This is a mere question of construction, whether, directing, that the settlement should be punctually complied with, he did not mean, that these younger children should take under that, and also under the Will. The provision by the settlement is confined to children, that shall be living at the death of the survivor of the father and mother: so that, if all had died in the life of the mother, nothing could have been raised. The only advancement upon marriage was that to Mrs. *Lee*.

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The *Attorney General* and Mr. *Benyon*, for the Defendant.

This question depends, not merely upon the settlement and Will, but materially upon the advances made by the testator in his life. If it could be contended, that a provision by Will is not to be considered such an advancement in the life of the father, as would have the effect of satisfaction, the language of the proviso would

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not countenance that argument; for, after speaking of preferment in marriage in the life-time of the father, the words are, "*or otherwise provided for;*" and, in the next line, "*such portion or portions, or other provision;*" the language being so general, and in the alternative, the clause of satisfaction cannot be confined to advancement in marriage: but any other provision, as putting a child out in trade, &c. must be considered a satisfaction, unless the contrary is declared. It would be unreasonable to confine that provision to the single case of marriage, not applying it to other events, having the same effect in diminishing his means of providing for his family. Considering the object, why should there be a satisfaction in one case and not in the other? The Court will not adopt that limited interpretation, unless absolutely required. The fair interpretation is to consider the words of condition, "in case, &c." as repeated, coupling the latter sentence with the former, but distinguishing the events. A provision by Will being then to be considered, according to the large interpretation, an advancement, as much as if it was upon marriage, or more directly in the life of the father, this Will has no express declaration against satisfaction. Your Lordship must see that express declaration, with two witnesses; though, certainly particular words are not necessary. The punctual compliance with the settlement must be a punctual compliance with all its parts; including, therefore, the provision for relieving the estate in the events, in which satisfaction is declared. The Court cannot look at the improved state of the testator's circumstances.

2dly, The actual advances of the father in his life to some of the children must be taken as actual advances, as far as they will go; if that construction cannot apply to all. The intention upon the codicil is, that, if those are satisfied by actual advances, the others should be considered

considered satisfied by what they receive out of the residue: otherwise the object of the codicil, that all the younger children should share equally his property, would be defeated. If these three eldest of the younger children are satisfied fully in his life, the other two, coming in for their portions, will destroy that equality, the clear object of the codicil. At least a case of election would arise against the two younger children, upon the intention by the codicil, that they should receive no more than the others. The consequence is, that after an equal division with the others of the residue they shall not come for more by coming under the settlement. The difficulty is to shew, that the testator has made any declaration as to advances in his life-time, particularly advances subsequent to his Will. The only effect of the direction, that the settlement shall be punctually complied with, is to let the settlement remain, as it did, with the clause as to satisfaction in full force. It cannot admit the strained construction, that it is a declaration against satisfaction.

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Mr. Romilly, in Reply.

The last member of this long sentence, forming the proviso, is merely an explanation of the former, as if in a parenthesis; and the whole must be read, as if it was expressed thus: "if any shall have been preferred in marriage in the life-time of the father by portion or other provision." All the provisions were to be in satisfaction of the portion, unless the father should declare the contrary, either by Deed or Will; which is intelligible, when applied to provision by marriage: but, if the provision was by Will, he could not by Deed declare, that provision, made by Will, should not be a satisfaction of the settlement. He could not make a previous declaration as to future advancements; and therefore advancements subsequent to the Will, if within the proviso, must be abated from the 2000l. But they were

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were of a very inconsiderable amount: only part of the 400*l.* to *William*, and of the 500*l.* to *Robert*. As to the sums advanced before the Will, and the provision by the Will, though it cannot be contended, that a provision by Will is not in general to be considered an advancement in the life of the testator (58), this testator clearly must have intended, that the provision by the Will should not be a satisfaction. The only purpose, for which it could be necessary to mention the settlement in the Will, was to declare, the provision made by the Will, should not be a satisfaction of those by the settlement. If his meaning by these doubtful words of the Will was, that every provision of the settlement should \* be complied with, among others, that an advancement should be a satisfaction, he must have known, it was not necessary to mention the settlement; and that it was necessary, if his intention was, that the other provision was to be an addition. The answer to the objection, that they will not take equally, is, that the testator did not consider the various cases, that might happen: among others, that different children would be to take under the settlement and under the Will; perhaps contemplating, that he might survive his wife. But he never had it in contemplation, that the Defendant would take, first, as a younger child, and, afterwards becoming the eldest, would have had to contend for a different construction.

March 6th.

*The Lord* CHANCELLOR.

The object of this bill is to take the opinion of the Court, whether all or any part of the sum of 2000*l.* is to be raised under the trust of the term of 800 years.  
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(58) See *Rickman v. Morgan*, 1 Bro. C. C. 63. 2 Bro. C. C. 394. *Twisden v. Twisden*, ante, Vol. IX, 413. *Onslow v. Michell*, post, XVIII, 490. *Golding v. Haverfield*, 13 Pri. 593.

The amount was to be regulated and ascertained by the number of children, that should be living at the decease, not of the father or mother, but of the survivor. The codicil, not being attested by any witness, is not with reference to the settlement a declaration affecting the charge of portions; which required two witnesses. The 600*l.* to Mrs. *Lee*, I am informed, is the only sum, that was advanced on marriage; and, it is admitted, that part of these sums, particularly to *William* and *Robert*, was advanced after the date of the Will.

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On the part of the younger children it was insisted, that they are entitled to have the sum of 200*l.* raised. The Defendant, now entitled to the estate, \* contends, first, that they are not entitled to have any thing raised; that the estates they take under the Will, real and personal, are to be considered as portions, or as provisions, under the effect of the settlement itself satisfying the portions they could have claimed, being more than equal. It is next insisted, that, if the devise and bequest of the real and personal estates are not to be a satisfaction of the portions by the settlement, still the pecuniary advances, made to the children, respectively, are to be considered as to each respective child, as having satisfied entirely, or *pro tanto*, the share of each in such part of the 2000*l.* as that child could have claimed, if there had been no advancement. The more I consider this settlement, the less expectation I feel of forming a confident opinion as to the true result of it. This is a case, in which no difficulty arises upon the various principles, that govern implied satisfaction; for by the contract of marriage the Defendant has a right to say, every younger child, who has received any sum of money, advanced in the mode the proviso looks to, shall take that in satisfaction of the portion, or part of the portion; unless by a writing, attested by two witnesses, the father declares the contrary: therefore such advances, as are within

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within the meaning of the proviso, are by covenant in the settlement itself to be a satisfaction, unless the father, who has contracted for that power, makes that declaration in the form and manner, prescribed by the instrument.

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It is farther contended, and that is a very difficult question, that in this case no advances, except advances made upon marriage, are to be considered within the meaning of the proviso advances. With reference to that, the Court has to struggle with the difficulty of making a grammatical construction; which leads me to adopt a meaning, that could not be collected from such a proviso in any settlement, that has fallen under my observation. In general such a proviso is inserted for the benefit of the child, who is to take the estate: sometimes reserving, as in this instance, to the father a discretion to determine between him and the younger children; whether the former shall take the estate more or less beneficially. But, in general, where there is such a proviso, the parties look to provision, not merely upon marriage, but upon other events also, from preferment or advantage; and, where the father is dealing for his eldest son, who is to take the bulk of the estate, it is of little consequence, whether part is to go upon marriage, or upon any other occasion, calling for the application of part, as provision or preferment. On the other hand, though a peculiar and uncommon way of reasoning, the party may, if he thinks proper, covenant, that the advances shall be only upon the event of marriage. The words of this proviso are capable of two senses. One sense, the most applicable to grammatical construction, is, that, if a child should be preferred in marriage, and the father should upon that marriage give a portion, or other provision, then such portion or provision should be a satisfaction; and it is clear, there may be an advancement

ment in marriage, not by a portion, but by a provision of a different nature: for instance, a real estate, settled upon a son; which is not strictly a portion, as that term occurs here. That sense receives countenance from the words, that follow; expressing, that, if he should have bestowed or given any portion or portions, &c. Upon any other construction all those words would be unnecessary. The passage is capable also of this construction; that, if the father shall prefer any of the children in marriage, or, if he shall otherwise provide for them, then such portion or provision shall be accounted a satisfaction. My opinion upon the whole is, that considering the policy, view, and intent, of these provisions in marriage settlements, and considering, that a sort of fair dealing between the eldest and the younger children requires, that advances upon one or another occasion, unless the father makes a declaration to the contrary, shall be taken in ease of the estate, and considering the ordinary habit of conveyancing, the larger construction of these words is the best.

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The next consideration is, whether the provision by the Will as to all the real and personal estate is a satisfaction entirely of all the younger children could claim. It is truly said, that a provision by Will is to be considered as an advancement in the life-time of the party. That has been repeatedly decided (59); and is not to be disturbed. It is contended by the Defendant, that it is not sufficient, that the meaning of the testator was, that it should not be a satisfaction; but he must declare that meaning; and I agree to that. But, on the other hand, if I can ascertain from the Will an intention, that it should not be a satisfaction, his Will may be taken to be

Provision by Will considered an advancement in the life of the testator.

(59) See *Rickman v. Morgan*, 1 Bro. C. C. 63. 2 Bro. C. C. 304. *Twisden v. Twisden*, ante, Vol. IX, 413. *Onslow v. Michell*, post, Vol. XVIII, 490. *Golding v. Haverfield*, 13 Pri. 598.

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be a declaration of that, though it is not expressly declared; for his intention, that the child was not to retain it in satisfaction, cannot be said to be expressed upon the Will, unless it is admitted, that in those very words the testator has declared his intention; and, if so, that declaration is sufficient. The Plaintiffs insist, that the Will shews, not only, that he did not intend, that the devise and bequest of his real and personal estate should be a satisfaction; but that he has gone the length of indicating, that he did not mean, sums advanced should be a satisfaction, either entirely or *pro tanto*. There is a striking peculiarity in this settlement.

\* The amount of the money to be raised upon the whole for the portions of younger children is to be regulated by the number, that should be living at the death of the survivor of the parents. Notwithstanding that, the settlement itself contemplates advances, made to children in the life of the father: in the life of one of the parents, both of whom the children must survive, in order to be reckoned among those children, whose number is to determine the sum to be raised. It is very difficult to say, that under the true meaning of this settlement a child, not surviving both parents, would have taken any portion; though that child should have attained the age of 21, and left a family. The father therefore might have advanced five or six children in his life; and might at length have died, leaving two children, neither advanced in any degree; and then the effect of the settlement would have been, that the 2000*l.* should be raised for them: the children advanced being dead; and therefore, not having survived both parents, not entitled to any share of the 2000*l.* Another circumstance is, that the Will gives the real and personal estates to his children, who might survive him; and gives vested interests immediately upon surviving him in the real and personal estates so given: but those children might not be entitled to take any thing in the 2000*l.*; for the  
 same

same reason, that applied to children, who died in the life of both parents, would apply to those, who died in the interval between the deaths of the father and mother.

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The codicil may be read as to the general personal estate, though not as to the 2000*l.*; and from all the three instruments together, as far as the Court can look at them, is to be decided, what the father meant as to the 2000*l.*; having regard to his intention as to his own personal estate. Having a considerable family, \* he was regulating by the Will the interests they were to take, both in the sum of 2000*l.*, which might be raised, if two survived the parents, and 1500*l.*, the sum to be raised, if only one survived. He was regulating also, what they were to take in his real and personal estates. Upon the expression, "that the same be punctually complied with," it is contended, and fairly, that the subsequent devise is not to be taken as a satisfaction of the portion under the settlement, in a case, where a devise must be held to be an advancement in the lifetime: that is, that this devise itself is not a satisfaction. On the other hand, if it is meant, that he did not intend, that advances he had made, or should make in his life, should be taken as a satisfaction, that is going too far; for though the clause seems unnecessary, this meaning must be put upon it; that he intended all parts of this instrument should be punctually complied with; and the proviso for satisfaction by advances is one part. But that is more clear from the subsequent residuary clause; which shews, that the prevalent idea in his mind was equality among them. I cannot see, how that object could be accomplished; unless he thought, that, supposing sums, to be advanced, were to be accounted a satisfaction *pro tanto*, yet this devise itself should not satisfy altogether the portions; for he has directed, that what a child had received should be deducted from this; and  
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his real meaning, I think, was, (what the codicil, as far as it can be looked at, manifests), that the settlement should take place as to each child, advanced within the meaning of the settlement; that his devise and bequest of the residue of the real and personal estates should also take effect for the benefit of his younger children; and as to the sum, to be raised under the settlement, and the fruit of the devise and bequest of the real and personal estates, to be distributed so as to make them equal, he meant, that, if one had received 600*l.*, that \* child, if that would be more than his share, not only should receive nothing, but so much as exceeded his share of the 2000*l.*, should be deducted from his share of the produce of the real and personal estates. To explain this: if there were five children, and none of them had been advanced, they should equally divide the 2000*l.*, and the produce of the real and personal estates: but if one had received 600*l.* in the life of the father, 400*l.* of that sum should be taken as the part of that child in the 2000*l.*; and the remaining 200*l.* should be taken as part of his share in the produce of the real and personal estates; and in that way the father would have corrected that inequality, that otherwise might have arisen among the children, surviving him but not surviving the mother; and the effect of the Will and Codicil together as to that case would be, that one, surviving the father, and not surviving the mother, would be ultimately made equal to one, who survived both parents,

My opinion, rather than a judgment, upon this case is, that according to the real intention and legal effect of all the instruments money advanced by the father, as preferment in marriage, or on any other occasion, is an advancement within the proviso; that the devise and bequest of the real and personal estate is not in this case an advancement in the life of the father; and the

the substantial effect of all the three instruments is, that the 2000*l.*, and the produce of the real and personal estate, should ultimately be divided equally among all the younger children; and, therefore, a younger child, advanced in the life of the father, in the sense I have given, must allow that in the account. If the advancement does not go to the whole extent, it is so much in discharge of the portion; and that child would be entitled to the full proportion of the produce of the real \* and personal estates. But, if that child received more than the proportion, that is not only a satisfaction of the portion, but also the excess is *pro tanto* a satisfaction of the produce of the real and personal estates; and the two sums must be finally arranged so that the children, who survived the father only, and those, who also survived the mother, should all take alike. There could be no doubt, if the codicil had been attested by two witnesses. But the general personal estate cannot be distributed in the way he has directed upon any other construction of the Will and codicil; and the codicil has its effect by that disposition of the personal estate. He looked to the possible event of the death of children between the deaths of himself and his wife. His leading idea was, that all his younger children should be equal; and I do not know, how that object can be attained upon any other construction.

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The Defendant, having been a younger child, is to be considered so in the account between the children: notwithstanding the accident, by which he is now become owner of the estate (60).

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(60) In *Savage v. Carroll*, 198, by the circumstance, 1 *Ball & Beat.* 265, this case that the younger child be- is upon this last question dis- came the eldest after ad- tinguished from *Chadwick v.* vances received in satisfac- *Dolman*, 2 *Vern.* 528, *Beale* tion of the portion in the *v. Beale*, 1 *P. Will.* 214, and former character.  
*Lord Teynham v. Webb*, 2 *Ves.*

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The Decree declared, that according to the true effect of the Settlement, Will, and Codicil, all the younger children of *Stephen Martin Leake*, who survived him, were entitled to take equally the produce of his residuary real and personal estates, and also so much of the 2000*l.*, secured by the settlement, as, regard being had to the testator's advances, would be due to any of the younger children, who survived their mother; and, it being admitted, that *John* had been advanced 100*l.*, *Thomas* 400*l.*, *Robert* 500*l.*, *Elizabeth* 600*l.*; all those children having survived their mother; and *William*, who died during her life, having been advanced 400*l.*; that \*there were two other children, *George* and *Ann*, who survived the mother, and were not advanced; and *William*, not having survived the mother, though he outlived the father, not being entitled to any share of the 2000*l.* under the settlement; and therefore the 400*l.*, advanced to him, not being a satisfaction of any part of the 2000*l.*; the decree declared the several sums to be raised under the settlement, amounting to 900*l.*; and that by the effect of the Will and codicil, operating upon the settlement, all the younger children, who survived the testator, were to take in equal shares, whether they survived the mother, or not, both the produce of the residuary real and personal estate of the testator, and also so much of the 2000*l.* as should be in the events, that took place, to be raised for any of the younger children: the children advanced bringing into the distribution the amount of their respective advancements; and it being admitted, that the residue of the testator's estate was 3920*l.*, out of which each child, who survived the father, was made equal to *Elizabeth*; leaving 1120*l.*; which is 140*l.* to each; making each take 740*l.*; as it appeared they had done; but as the intent was, that what should be finally to be raised of the 2000*l.* should be divided in like manner as the testator's residuary real and personal estate, it was declared, that the shares of

*John*,

*John, George, and Ann*, respectively, are under the Settlement, Will, and Codicil, to be divided equally among the eight children, who survived the father, and the personal representatives of those, who were dead; those advanced by the father having already upon the distribution of the residuary real and personal estate allowed for their advances: it was therefore declared, that the 900*l.* upon the death of the mother, and any interest due, was to be divided into eighths: one-eighth to be retained by *John*, now the owner of the estate; the other eighths to be paid by him, as such owner, to \* *Thomas, Robert, George, Ann, Elisabeth*, and the representatives of *William* and of *Mary*; though they died in the life of their mother.

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LEAKE  
v.  
LEAKE.

[ \*495 ]

TRENT v. HANNING.

1805.

March 11th.


**JOHN TRENT**, seised in fee of estates in the island of *Barbadoes*, conveyed previously to his marriage with *Eliza Phipps* in 1792 to the use of himself for life, without impeachment of waste, with remainder in trust to secure an annuity of 500*l.* to *Eliza Phipps* for her life, in lieu of dower; secured by a trust term of 200 years; remainder to himself in fee. In 1796 he made the following Will, duly executed to pass real estate :

A. seised in fee, subject to a jointure of 500*l.* a-year to his wife, by Will, duly executed to pass land, gave to his wife " 200*l.* " *per annum* " during her " natural life, " in addition " to her jointure; " his

" I *John Trent* do hereby give unto my wife 200*l.* *per annum* during her natural life in addition to her jointure

debts being previously paid; and to his two younger children 6000*l.* each; and appointed three persons " as trustees of inheritance for " the execution hereof." Whether any interest in, or power over, the real estate passes to the trustees, *Quare*.

The *Lord Chancellor*, not being satisfied with a Certificate of the Court of Common Pleas in the negative, upon a case directed, sent a case to the Court of King's Bench; there being only one instance of sending a case back to the same Court to be reviewed.

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" ture my just debts being previously paid; and I do  
 " give unto my two younger children 6000*l.* each to be  
 " paid when they severally come to the age of 21; and  
 " I do appoint *John Hanning, William Hanning, and*  
 " *Constantine Phipps* as trustees of inheritance for the  
 " execution hereof."

The testator died; leaving his widow, the two younger children, mentioned in the Will, and a child born afterwards, to whom he gave 6000*l.* by a codicil, surviving. *Constantine Phipps* survived the testator, and is since dead.

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Under the bill, filed after the death of the testator by his widow and children, a case was directed to the Court of *Common Pleas* upon the following question: Whether *John Hanning, William Hanning, and Constantine Phipps*, took any and what estate or interest in the real estates of the testator under his Will: or, whether they had by virtue of such Will a power to make any conveyance or appointment of any and what estate or interest of or in such real estates; and, if they had, whether such power survives to *John Hanning and William Hanning*?

The Certificate of the Court of *Common Pleas* was in the following terms:

" This case has been argued before us by Counsel;  
 " and we are of opinion, that the said *John Hanning,*  
 " *William Hanning, and Constantine Phipps*, did not take  
 " any estate or interest in the real estates of the said  
 " *John Trent* under or by virtue of the Will of the said  
 " *John Trent*; and, that the said *John Hanning, William*  
 " *Hanning, and Constantine Phipps*, had not by virtue  
 " of such Will a power to make any conveyance or ap-  
 " pointment

“pointment of any estate or interest of or in such real  
“estates.”

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TRENT

v.

HANNING.

J. MANSFIELD.

J. HEATH.

G. ROOKE.

A. CHAMBRE.

The cause came on upon the equity reserved.

Mr. *Romilly* and Mr. *Hart*, for the Plaintiffs, objected to this certificate; and pressed to have it reviewed. They contended, as to the 200*l.* a-year, that it must be understood, that the jointure of the widow was enlarged • from 500*l.* a-year to 700*l.* a-year; which would make it a charge upon the real estate. If the trustees do not take any interest whatsoever in the real estate, the appointment of them “as trustees of inheritance for the “execution hereof” must be struck out, as incapable of any meaning. According to a note of what passed in the Court of Common Pleas an opinion seems to have been entertained, that, though no legal estate vested in the trustees, the sums of 6000*l.* would in equity be a charge. But it is difficult to conceive, how the estate can be charged in equity, if it is not charged at law; and to contend, if the trustees do not take, that the children have any charge upon the real estate. The Will is executed with the ceremonies required for passing real estate. The term “*jointure*” is applicable to real estate; and the phrase “trustees of *inheritance*” is peculiarly so. Suppose, he had expressed, that these directions should be performed out of his real estate.

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Mr. *Richards* and Mr. *Bell*, for the Defendants.

There are no authorities applicable to this case. From the mere circumstance, that there are three witnesses to the Will, it cannot be conceived, that the testator intended to affect his real estate. The 200*l.* a-year



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cannot be said to be charged upon the real estate. The testator merely gives his wife 200*l.* a-year; adding that to her jointure. It happens, that she has a jointure upon real estate; and he gives her 200*l.* a-year over and above her jointure. In giving that he has no reference to real estate in any manner; and it would be a most violent construction to consider it a charge, merely as being expressed to be given in addition to a jointure, that happens to be on real estate. As to the other part of the Will, where are the express words, or necessary implication, to disinherit the heir? The word "*inheritance*" is not necessarily applied to real estate. *In common acceptation the word "*heir*" is frequently applied to personal property. There is no allusion to real estate in this Will.

Mr. Romilly, in Reply.

The phrase "*in addition*" may mean merely something besides what was before given: but it is capable of the meaning the Plaintiffs insist upon, something of the same nature; and being, not a sum in gross, but an annual payment, the fair construction is, that it is an annual payment in the same manner. This Will has plain words, expressing without ambiguity the intention to give an estate of inheritance; and what other purpose could he have? The Court never strikes words out of a Will without absolute necessity; and that must be done upon the other construction. *Rogers v. Rogers* (61) is like this case.

The Lord CHANCELLOR.

A very strong thing is asked; that, notwithstanding this opinion of a Court of Law, I should now hold, that these sums of 6000*l.* ought to be raised out of the real estate. It is intimated, that the Court of Common Pleas did not conclude against their being raised in this Court.

(61) *Bor.* 268.

Court. That is very difficult, unless the latter words do affect the real estate; and, if they do, it is very difficult to support the opinion of the Court of Common Pleas. It is another question, whether the point is to be considered of difficulty enough to require farther consideration there, or by sending it to the Court of King's Bench; which is much the same course as upon a writ of error. I think, I ought not to conclude the children without giving them the opportunity of again submitting the question to the Court. The question is, whether there is reasonable doubt upon the whole? My mind does entertain considerable doubt. First, he gives his wife 200*l.* a-year during her natural life, in addition to her jointure; his just debts being previously paid. The first question is upon the effect of that, a mere annuity out of the personal estate in addition to the jointure, given, not out of the personal, but out of the real estate; whether the addition is to be *ejusdem generis* with the thing, to which it is added: viz. an out-going from the real estate; and it is very necessary to decide that, from the words, that follow, as to the debts; for it will follow of course, that the debts also must affect the real estate; and if they are charged, then the trustees, who by the last words are to execute the purposes of this Will, must have the means of paying the debts out of the real estate. How? Unless either by taking an interest in it by devise; or an authority by way of power. Also I doubt, whether there is any provision for creditors by those words "my just debts being previously paid;" which, though in some cases they would operate a charge, would not be so, if the trustees in the last clause are to be considered trustees merely in the sense of the Ecclesiastical Court, as executors (62); for,

reading

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(62) Ante, *Williams v. Chitty*, *Shallcross v. Finden*, Vol. III, 545, 738. *Powell v. Robins*, VII, 209.

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reading it so, if the debts are not charged upon the real estate, it would be very difficult to say, the portions can be charged: if the debts are charged, it must be held, either, that the trustees have an interest in the real estate for the payment of the debts, or a power to raise them out of the real estate; and then upon the same reasoning the portions must be charged upon the real estate; for, if they are trustees "for the execution hereof" in respect of the debts, they are also trustees for any other purpose, to be hereby executed. Suppose, without more, the testator, executing his Will in the presence of three witnesses, (which does not go any considerable way to conclude), had said, "I hereby direct all my * debts to be paid," and made these persons trustees of inheritance for the execution of his purpose. This Court would struggle for a charge; and yet it would be impossible; unless a Court of Law would hold, that the trustees had either an interest or an authority. If upon that case this Court would hold it a charge, there is considerable doubt, whether upon this Will he did not intend them to be trustees of inheritance in this property for the purposes of this Will.

I have, therefore, no objection upon the part of the infants to a reconsideration of this question; as I should not have an objection to that on the part of the heir. There is so much doubt upon it, that, if the estate was to have been sold, a purchaser would have a right to more discussion. I remember but one instance, in which a case was sent back to the same Court, to be reviewed. That is the case of *Utterson v. Vernon* (63). Therefore the best way will be to see, whether the Court of King's Bench will agree with the Court of Common Pleas upon this (64).

(63) 3 *Term Rcp.* 529. ingly sent to the Court of
 4 *Term Rcp.* 570. King's Bench upon the same

(64) A case was accord- questions. That Court, not
 agreeing

agreeing in opinion, returned separate certificates; Lord *Ellenborough*, and *Grose* and *Le Blanc*, Justices, that *John* and *William Hanning* and *Constantine Phipps* took an estate in fee in remainder in the said real estates of the said *John Trent*, subject to the Term of 200 years, created by the Settlement; and *Lawrence*, Justice, that they did not take any estate or interest in the real estates of the said

John Trent; and that they had not by virtue of his Will a power to make any conveyance or appointment of any estate or interest of or in such real estates. The Report, 7 *East*, 97, represents the case as having been sent by the *Master of the Rolls* for the opinion of the Court of King's Bench; and does not notice the Case sent to the Court of Common Pleas or the Certificate of that Court.

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TRENT
v.
HANNING.



WILLIAMS v. COADE.

ROLLS.

1805.

March 12th.

ELLERY BEAVIS, by her Will, duly executed to pass real estate, dated the 13th of *November*, 1800, devised all her real estate to trustees, their heirs, and assigns, upon trust, that they shall, as soon as conveniently may be after her decease, and they in their discretion shall think fit, absolutely sell and dispose of the same; and pay, apply, and dispose of, the monies, that shall arise by and from such sale or sales, upon the several trusts, and to and * for the several ends, intents, and purposes, and in the manner, hereinafter mentioned and declared of and concerning the same. Then, after directing, that the receipt of the trustees shall be a sufficient discharge to the purchasers, and, that they shall not be obliged to see to the application, &c. but shall hold and enjoy, discharged from all claims under her Will, she appointed her trustees executors; but to, for, and upon, the trusts, ends, intents, and purposes, hereinafter also declared; and as to,

Conversion of real estate into personal by Will for a particular purpose, which failed: a resulting trust for the heir, against the next of kin.

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WILLIAMS
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to, for, and concerning, the money, which shall arise, or be produced, by any such sale, as aforesaid, and from her said executory trust estate and effects, she directed, that her trustees should, in the first place, pay her debts, funeral charges, &c. and also all such sums of money as shall be owing upon the security of her said estates, or any of them; and in the next place shall pay the several legacies after mentioned.

The testatrix then, after giving several legacies, and directing conveyances of several parts of her real estate, in pursuance of contracts for sale, which she had entered into, after the several payments before directed, as to all the residue or surplus of the monies, which shall arise from such sales of her said estates, as aforesaid, declared a trust in the first place to invest the sum of 1400*l.* in the funds, or real or other securities; and, after giving two annuities for life of 20*l.*, and one of 10*l.*, out of the interest; as to the rest of the interest and produce of the said sum of 1400*l.*, from and after the several deceases of the annuitants, she declared her Will, that the same shall sink into, and be considered as part of, her residuary estate, and be paid and applied in the same manner, and in such parts, shares, and proportions, as are hereinafter expressed and declared of and concerning her said residuary estate: and she gave and bequeathed her “said residuary estate and effects of
[*502] “* what nature or sort it may be, including the monies “to arise from the sale of the said several estates “as aforesaid, from and immediately after such sale or “sales shall be completed as are hereinbefore directed “to be made in manner following:” viz. in fifth parts, to *Samuel Beavis, James Beavis, John Beavis, Mary Beavis*, and *Ellery Beavis*, junior, and their respective executors, &c.

The

The testatrix then directed, that, until such sales shall be made and completed, as aforesaid, the rents, issues, and profits, of her said several messuages, lands, and hereditaments, subject to the several payments before directed, shall be considered to all intents and purposes as personal estate, and be paid, applied, and disposed of, accordingly, unto and amongst them, the said *Samuel Beavis*, &c. She then directed, that it should be lawful for her trustees, their heirs, &c. until such sale or sales shall be made, as aforesaid, to lease for 21 years.

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WILLIAMS
v.
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Samuel Beavis died in the life of the testatrix. After her death the bill was filed by the surviving trustee, to have the rights of the several Defendants ascertained; the devisees of the heir at law claiming one-fifth of the produce of the sale of the real estate, as having lapsed by the death of *Samuel Beavis*; and, therefore, to be considered as real estate undisposed of. On the same ground of lapse it was also claimed by the next of kin, there being no general residuary legatee; as being made personal property for all purposes.

Mr. *Romilly* and Mr. *Roupell*, for the heir at law, relied on the cases of *Ackroyd v. Smithson* (65), *Cruse v. Barley* (66), and *Fletcher v. Ashburner* (67), as establishing * a resulting trust for the heir; observing, that the clause as to the rents and profits until the sale shewed distinctly, that the intention was not, that the real estate itself should be considered personal until that period.

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Mr. *Alexander* and Mr. *Minshull*, for the next of kin.

This lapsed share goes to the next of kin, as being converted out and out, according to the principle, stated accurately

(65) 1 Bro. C. C. 503.

(67) 1 Bro. C. C. 497.

(66) 3 P. Will. 20.

1805.

 WILLIAMS
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 COADE.

accurately by Mr. Cox (68); which is supported by *Mallabar v. Mallabar* (69), *Durour v. Motteux* (70), and *Ogle v. Cook* (71). There is not a circumstance in the Will in *Mallabar v. Mallabar*, shewing an intention, that the money raised by the sale should go to the person, taking the personal estate, except the direction to sell: yet every thing would have passed to the next of kin, if there had not been a residuary legatee. These three cases establish the rule, as stated by Mr. Cox; depending upon the intention to give the real estate the quality of personal property to all intents and purposes, or only for the particular purposes of the Will. The former intention is the result of this Will. It is expressed as to the rents and profits; and the true inference from that is, that the intention was the same as to the estate itself. The testatrix, contemplating the event, that her real estate should become personal, to prevent any thing arising out of it from being considered as of a real nature, makes that express declaration as to the rents and profits.

Mr. Romilly, in Reply.

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No case has varied the rule upon this point; that where a conversion of real estate is directed for a particular purpose, that cannot take effect, the title of the heir prevails. In *Ackroyd v. Smithson* the direction for conversion was most absolute. In *Mallabar v. Mallabar*, and the other cases, that have been cited, the question was, not between the heir and next of kin, but between the heir and the residuary legatee. There is no residuary disposition as to this fifth, that is lapsed; and then

(68) 3 *P. Will.* 22, in the note to *Cruze v. Barley*.

(69) *For.* 79, cited by Mr. Alexander, from a MS. note.

(70) 1 *Ves.* 320. The Will is stated from the *Register's Book*, 1 *Sim. & Stu.* 292.

(71) Cited 1 *Bro. C. C.* 501. See ante, Vol. II, 686.

then the title of the heir at law must prevail against the next of kin; who can claim only as in case of intestacy. *Ogle v. Cook* at first appears to bear against this doctrine; but that case was examined by Lord Rosslyn in *Collins v. Wakeman* (72); and appeared not to contradict the other authorities. The only question then is upon the clause as to the rents and profits; which raises a difficulty; as the rents and profits unquestionably are personal estate without any direction. But that clause cannot make a difference; expressing merely the same purpose as to the rents and profits, that she had before expressed as to the estate itself: viz. that it shall be personal estate to these individuals.

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WILLIAMS
v.
COADE.

The MASTER of the ROLLS.

There could not be a more absolute direction for conversion than that in *Ackroyd v. Smithson*. It is clear, this case must be governed by that; which it entirely resembles; except in a circumstance, perfectly immaterial, the clause, directing, that the rents and profits, until the sale shall be completed, shall be considered to all intents and purposes as personal estate. The rents and profits are personal estate certainly. That direction, therefore, is most immaterial. But the testatrix immediately adds the purpose, for which that nugatory direction is given; to be paid, applied, and disposed of, accordingly, among these persons. Even in that unmeaning direction she professes no other object. The only purpose, for which this estate is taken from the heir, is, to be given to those residuary legatees; and, if they cannot take, there is no indication of an intention to take the estate from the heir, and to give it to the next of kin. This differs from *Mallabar v. Mallabar*, and *Durour v. Motteux*; neither of which was a case of lapse: but the question was, for whose benefit the testator

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(72) Ante, Vol. II, 683.

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 COADE.

tator meant the estate to be sold. By this Will it is ascertained, for whose benefit the sale is directed; and that purpose failing, who is to take the estate from the heir; from whom it is taken for no other purpose, but that these persons should have it?

Declare a resulting trust, as to the real estate for the heir, and as to the personal estate for the next of kin (73).

(73) Ante, *Sheddon v. Goodrich*, Vol. VIII, 481. *Brown v. Bigg*, *Ripley v. Waterworth*, VII, 279, 425. *Kennell v. Abbott*, IV, 802; and the references in the notes, I, 45, 204.

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1805.

March 7th,
 11th, 13th.

Specific performance of an agree-
 ment for the sale of an estate decreed, notwithstanding

DYER v. HARGRAVE.

HARGRAVE v. DYER.


THE object of the first bill was to compel the Defendant to complete his contract for the purchase of a leasehold farm from the Plaintiff as executor. The bill in the second cause was to have the agreement delivered up, to be cancelled.

The

ing a variance from the description; with compensation for the deficiency in value; though a minute examination might have discovered the defects; as in the state of the house and the cultivation of the lands; not for a variance from the description, as lying within a ring-fence; as being an object of sense; and upon the evidence the purchaser being apprised of it.

The premises consisting of a leasehold farm, and three years having expired pending the Suit, interest was given to the vendor, and a rent set upon it in respect of his possession.

The premises were sold by auction upon the 23d of *February*, 1802. The Particular described the house, as being in good repair, and the farm, as consisting of 150 acres, part arable, and part marsh land, in a high state of cultivation; all within a ring-fence.

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 v.
 HARGRAVE;
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 DYER;

The objections, taken by the answer, were, that the house was not in good repair; that the lands, instead of answering the description of a high state of cultivation, were in a very impoverished state, from neglecting to manure and drain; and the farm was not in a ring-fence; but was intersected by other lands. Upon these objections there was a great deal of contradictory evidence: for the Defendant, supporting the answer: for the Plaintiff, that an expenditure of only 25*l.* would put the house in complete repair; that the land was in a high state of cultivation; and that the farm answered the description, as lying within a ring-fence.

Mr. *Richards*, Mr. *Trower*, and Mr. *Wetherell*, for the Plaintiff in the original bill, insisted, that these objections do not go to the foundation of the relief: at most the Defendant could only make out a title to compensation; with which a specific performance has been enforced in much stronger cases; and it is too late now to consider, whether as to that the Court has gone too far; that the description given by the Particular, was in each instance substantially right, according to the evidence; and, that there could be no recovery upon a warranty, where the defect was visible.

Mr. *Romilly* and Mr. *Belt*, for the Defendant, insisted, that a warranty is binding; even though the defect is *obvious; but in this case circumstances occur, that are the object of judgment and skill. Upon the point of compensation they noticed the excessive length, to which the Court had gone: the cases of an estate, sold as freehold,

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 DYER  
 v.  
 HARGRAVE.  
 HARGRAVE  
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hold, part of which was leasehold: an estate sold as tithe-free; which was subject to tithe: the purchase made with the particular object of having a freehold in *Essex*, of premises, which, though situated on that side of the *Thames*, were part of the county of *Kent*; and contended, that the Court would not go farther (74).

The cases cited were *Hicks v. Phillips* (75). *Howard v. Hopkyns* (76). *Shirley v. Stratton* (77). *Pincke v. Curteis* (78). *Fordyce v. Ford* (79). *Calcraft v. Roebuck* (80). *Drewe v. Hanson* (81). *Drewe v. Corp* (82).

Warranty  
 upon a sale  
 against an ob-  
 vious defect  
 not binding.

*The MASTER of the ROLLS*, having during the argument said, it was held at Law, that a warranty is not binding, where the defect is obvious; and put the case of a horse, with a visible defect: a house without a roof or windows, warranted as in perfect repair, pronounced the following judgment:

It is impossible to refuse a performance of this contract. It is much too late to contend, that every variance from the description will enable a man to resist the performance. The principle is, that, if he gets substantially that, for which he bargains, he must take a compensation for a deficiency in the value. Whether the Court has not in many cases gone beyond the spirit of that rule, is another consideration. Whether the Court ought to compel a Defendant to take compensation for that, which can hardly be estimated by pecuniary value, may admit of doubt. In this case there can be

no

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(74) See as to all these cases ante, Vol. VI, 678, in *Drewe v. Hanson*, and the note, I, 226.

(75) *Pre. Ch.* 575.

(76) 2 *Atk.* 371.

(77) 1 *Bro. C. C.* 440.

(78) 4 *Bro. C. C.* 329.


(79) 4 *Bro. C. C.* 494.

(80) Ante, Vol. I, 221.

(81) Ante, Vol. VI, 675.

(82) Ante, Vol. IX, 368.

No doubt, except as to the objection, that the premises are not in a ring-fence, whether the whole is not the subject of pecuniary compensation. As to the repairs, unless it could be shewn, that the Defendant wanted possession of the house to live in at a given period, it is mere matter of pecuniary estimation. The same observation applies to the situation of the marsh land: the Defendant loses nothing but money by finding that in a worse state of cultivation than it was represented. That admits a certain estimation. It is not quite so certain, that a precise pecuniary value could be set upon the difference between a farm, compact, in a ring-fence, and one scattered, and dispersed with other lands. But in this instance the purchaser is clearly excluded from insisting upon that, as an objection to complete the contract. He saw the farm, before he purchased. He was willing to purchase it by private contract. He had lived in the neighbourhood all his life. This variance is the object of sense. He must have known, whether the farm did lie in a ring-fence, or not. It is sworn by one witness, that it was distinctly pointed out to him, that there were fields, belonging to other persons, lying intermixed. But, independant of that he could not conceive himself purchasing any thing in a ring-fence; for the evidence of his own witnesses shews, that there are 30 or 40 acres of others intermixed, above his 150 acres; and he does not pretend, that he thought the farm larger than it turns out to be. He had repeated opportunities of going over the farm. If he acquiesces in the situation of what he purchased, and goes on with the treaty, he cannot afterwards get rid of the contract (83).

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Whether compensation is to be made is a different consideration. Upon the same ground, that the Defendant cannot get rid of the contract on account of the difference

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(83) *Bowles v. Round*, ante, Vol. V, 508.

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DYER

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difference in the description of the farm, he cannot be entitled to compensation; for it was an object of sense. He could not be deceived. He could not have an imperfect knowledge; for, if he had any knowledge, that any thing was mixed with the subject of his purchase, that puts an end to the description; and, if I give him compensation, having that knowledge, he gets a double allowance; for, if he has knowledge, that what he proposes to purchase does not answer the description, it must be taken, that he bids so much the less. The two other objections admit a different consideration; for they are such as a man may have an indistinct knowledge of; and he may have some apprehension, that in those respects the premises do not completely correspond with the description; and yet the description may not be so completely destroyed, as to produce any great difference in his offer. As to the marsh land, it is very uncertain, whether by any view it was possible for him to judge of that. It is stated by many witnesses, that the season of the year was just at the breaking up of a frost; and represented, that no man could at that time say, whether the land was well or ill cultivated. So, he may have seen some trifling defects in the house; and might not intend to make the objection, if they turned out to be nothing more than they appeared upon the surface. He might consider them too trivial; and not mean to claim compensation for an object so insignificant. But afterwards, when he came to examine, according to this evidence, he discovered, that the house was materially defective, very much out of repair. Admitting, that he might by minute examination make that discovery, he was not driven to that examination: the other party \* having taken upon him to make a representation: otherwise he would be exonerated from the consequence of that in every case, where by minute examination the discovery could be made. The purchaser is induced to make a less accurate examination by the representation; which

which he had a right to believe. This purchaser therefore is entitled to compensation for the defects of the house and the cultivation of the marsh land; but not for the other subject of objection.

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The Cross Bill must be dismissed with costs. Under the original bill a specific performance must be decreed: but I shall not give costs to the Plaintiff. As to the time, it does not follow necessarily, that the Defendant must have been apprised, and have slept upon the defects. In *Drewe v. Hanson* (84) there was a longer time: but the *Lord Chancellor* did not think that sufficient.

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Mr. *Romilly*, for the Defendant, observed, with reference to the time, at which the agreement was to have been performed, that there must be some rule as to leasehold interests; that this agreement ought to have been performed three years ago; and the purchaser could not be expected to take a term of twenty-four years at the price, which he had agreed to give for a term of twenty-seven years. The causes stood over, that authorities might be found upon this point: but none were produced.

*The MASTER of the ROLLS* said, the reasonable course, which he should adopt, unless precedents could be produced against it, is, that for the time, elapsed before the execution of the agreement in consequence of the pendency of the suit, interest should be paid by the purchaser; and a rent should be set upon the premises in respect of the possession of the vendor.

March 12th.

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6th, 19th.

## LENCH v. LENCH.

Money settled to the separate use of the wife, and in the event of no children to her absolutely, surviving the husband; with power to the trustees with her consent to invest it in land.

No lien upon estates, purchased by the husband, having obtained the money from the trustee: the circumstances not raising the presumption, as if he had been

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under an engagement to purchase, that his purchases were in pursuance of that engagement; and

upon the evidence the fact of the application of the trust fund, or the inability of the husband by other means, not being made out.

Not a specialty debt from the husband by the effect of his covenant not to obstruct the appointment of the wife under a power.

BY a settlement, made upon the marriage of *Luke* and *Mary Lench*, dated the 2d of *February*, 1793, the sum of 1000*l.*, part of the portion of *Mary Lench*, was paid to trustees; upon trust to apply the dividends and interest to such person and persons, and for such uses, intents, and purposes, and in such parts and proportions, manner, and form, as she should from time to time, notwithstanding coverture, by any writing appoint, and in the mean time, &c. into her own proper hands, for her sole and separate use, exclusive of her husband; and after her decease for the issue of the marriage; with a power of appointment to her in certain events; and, in case she should survive her husband, and there should be no issue, to pay the principal to *Mary Lench* for her own absolute use and benefit; with power to the trustees with her consent to invest the money in the purchase of estates of freehold, or for long terms, or for lives, or years, determinable upon lives, or copyholds, to be settled to the same uses; and *Luke Lench* covenanted, that he, his executors, &c. would not obstruct her direction, appointment, or disposition; but that he, his executors, &c. would do any act to enable her thereunto, &c.

Previously to the marriage *Luke Lench* had purchased some freehold premises in *Worcester* to him and his heirs, for 240*l.*; which sum he borrowed from *James Hickman*. In 1795 he purchased other premises, held upon leases for lives, for 440*l.* subject to a mortgage for 300*l.*; and in 1799,

1799 other premises, also held upon leases for lives, for 360l. *Luke Lench* died in 1801, without issue, and intestate.

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The Bill was filed by *Mary Lench*, who had taken out administration to her husband, against his brother and heir at law; insisting, that the money, borrowed from *Hickman*, was paid out of the trust money by her husband; who upon that occasion received the title-deeds, which he had deposited with *Hickman*; and deposited them with the Plaintiff, for her security; that the other estates were also purchased with part of the trust money; and the deeds deposited with her for her security; and praying an account of the debts, &c. particularly of the Plaintiff's demand for 1000l. and interest under the settlement; that she may be considered a specialty creditor in respect of such demand; and may have satisfaction out of the real estates, either by virtue of an equitable lien, the estates having been purchased or paid for with trust money, or as a specialty creditor.

*Mary Pedley* by her depositions stated, that 1000l., part of the marriage portion, was deposited in her hands a few days previous to the marriage, upon the trust in the settlement; that a few days after the marriage she was requested by the Plaintiff to give it up: the Plaintiff informing her, she was requested by her husband to get the money out of the deponent's hands; that it consisted of cash and notes in a bag; which the deponent produced; but, whether the Plaintiff or her husband took it up, the deponent did not recollect; but has no doubt, it came afterwards into the hands of the husband; as he informed her, he had paid off *Hickman's* debt out of his wife's trust money. He also informed the deponent, he had bought the first house in the *London Road*; and she had heard him say, he had deposited the writ-

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ings of the house in *Worcester* with *Hickman*, with his note, as a security for the money lent previous to his marriage; and that he had repaid *Hickman* out of the said trust money, and had deposited the writings with the Plaintiff as a security. The deponent has heard him say, he had bought the house in the *London Road* with his wife's trust money, and also another house in the *London Road*. The deponent observed to him, that he had a deal of money to make all those purchases. He replied, he had paid it out of his wife's trust money, or, his wife's money.

Another witness stated, that the Plaintiff in conversation said to him, "Well, Mr. *Grainger*, I have bought this house at last;" upon which her husband added, "Yes she has; and with her own money."

The effect of the Defendant's evidence was, that the husband was a man of considerable substance; and that he had received 700*l.* upon his marriage, besides the 1000*l.* that was settled; and that the Plaintiff had declared, she had a claim upon the Bank at *Worcester* for 660*l.* of her money.

Mr. *Richards* and Mr. *Wooddeson*, for the Plaintiff.

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First, the Plaintiff insists, she is to be an incumbrancer upon the estate, bought with her money. In *Deacon v. Smith* (85) the evidence was much slighter than in this case; and Lord *Hardwicke* says, many cases have gone upon strong presumption only; throwing upon the other side the proof, that the husband did not intend, that the estate should be bound. *Lechmere v. Lechmere* (86), *Sowden v. Sowden* (87), establish the principle. The case of *Perry v. Phelps* (88) was the case of a trustee under a Will; not bound by any covenant.

2dly,

(85) 3 *Atk.* 323.

(86) *For.* 80.

(87) 1 *Bro. C. C.* 582.

(88) *Ante*, Vol. IV, 108.

*Post*, Vol. XVII, 173. *Denton v. Davies*, XVIII, 492.

2dly, The Plaintiff insists upon her right, as a specialty creditor. If the instrument is under seal, covenant lies; and the words are not material: 2 *Mod.* 91. *Benson v. Benson* (89). By taking the trust money the husband has broken his covenant not to obstruct her disposition.

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Mr. Romilly and Mr. Martin, for the Defendant.

Upon the question, whether this property can be followed, and, if it can, whether there is any satisfactory evidence, that this sum was laid out in land, the cases cited do not apply; for there was no obligation upon the husband to lay out money in land. He was to have nothing to do with the disposition of the money, or the mode, in which it was to be laid out. A trust cannot consistently with the Statute of Frauds (90) be raised upon the evidence of Mrs. *Pedley*, the trustee. The release to her is a suspicious transaction. She is answerable in the first place for the whole of the Plaintiff's demand. This property, settled to the separate use of the wife, and given up by the trustee to the husband, cannot be considered the property of another person in his hands; so as to bring it within the rule, that an estate bought with money, clearly belonging to another person, shall be a trust. This money has no ear mark. The case \* cannot be brought within the principle of *Lechmere v. Lechmere* (91), and *Sowden v. Sowden* (92). Then, upon the evidence, the transaction is nothing like a deposit of deeds, as a security to the Plaintiff.

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The MASTER of the ROLLS upon the other question stopped the Counsel for the Defendant; observing, that there was no colour for considering the Plaintiff a specialty

(89) 1 *P. Will.* 130.

(91) *For.* 80.

(90) Stat. 29 *Car.* II, c. 3.

(92) 1 *Bro. C. C.* 582.

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cialty creditor: the husband, having received the trust money, must replace it; but not upon the footing of any covenant.

Mr. Richards, in Reply.

This money could not be given by the wife to her husband; or be received by any one, with notice of the settlement, discharged of the trusts. Being a trust by operation of law, the Statute of Frauds (93) is no objection. This is within the covenant of the husband an obstruction. As to the other part of the case, it is within the spirit, if not the letter, of the cases, that where a person is under an engagement to lay out money in the purchase of land, and he makes a purchase, the presumption is, that it is made in pursuance of that engagement.

The MASTER of the ROLLS.

I wish to look into the Register's Book as to the case of *Wilson v. Foreman* (94); which must, I think, be imperfectly reported. There must have been some intermediate facts, connecting the purchase with the trust money.

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 March 19th.

The MASTER of the ROLLS.

The principal object of this bill is to establish the Plaintiff's claim to a specific lien upon houses, purchased by her husband: or, at least, that she may be declared a specialty creditor in respect of the trust money, received by him from the acting trustee in her marriage settlement. The claim of a lien is made upon two grounds: 1st, a presumption, which, it is said, ought to be made, that the husband made the purchases for the purposes of the settlement: next, upon the

(93) Stat. 29 Car. II, c. 3.

(94) 2 Dick. 593.

the fact, said to be established, that the purchases were made with the trust money. Upon the first point several cases have been cited; which have determined, that, where a husband, bound by covenant to purchase and settle land, purchases lands, but does not settle them, he is presumed to have made the purchase for the purposes of the settlement. But those cases do not appear to me to have any direct application; for in all of them land was to be purchased; and in all but one the husband had bound himself to make the purchase. That one is *Sowden v. Sowden* (95); in which the husband was not to make the purchase; but the trustees with his consent: the husband never paid the money to them; so as to enable them to purchase: but he made a purchase himself; and Lord *Kenyon* held that within the principle, upon which the presumption had in other cases been raised. But here there is, not only no covenant by the husband to purchase land, but no stipulation in the settlement, that land shall be purchased: there is only a proviso, that the trustees may, if they think fit, invest the money in land; and that two with the consent, not of the husband, but of the wife alone. So, without inquiring into the sufficiency of the ground, * upon which that presumption has in other cases been raised, it is enough to say, there is no ground for it in this case.

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Then, as to the other ground, that the purchase was made with the trust money, all depends upon the proof of the fact; for, whatever doubts may have been formerly entertained upon this subject, it is now settled, that money may in this manner be followed into the land, in which it is invested; and a claim of this sort may be supported by parol evidence. In *Lane v. Dighton* (96), though Sir *Thomas Clarke* declared, that, if it was

(95) 1 Bro. C. C. 582.

(96) Amb. 409.

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was *res integra*, he should have thought; parol evidence ought not to be admitted, yet he conceived himself bound upon the determinations of Lord *Hardwicke* to receive and act upon such evidence. In that case the trustee had permitted the husband to obtain possession of the money. It does not appear, that it was with the consent, or even the knowledge, of the wife. Here she was consenting to the payment by the trustee: but, as a married woman cannot bind herself by her own agreement, neither can she be bound by acts, which are only evidence of agreement. She is therefore not precluded from this sort of equity by that consent; supposing a ground for it in other respects established.

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Then, how is the fact made out? There is no material evidence but that of the trustee; who is made a competent witness by a release. She swears to no fact or circumstance, capable of being investigated, or contradicted; but merely to a naked declaration, supposed to be made by the husband himself; admitting, that the purchase was made with the trust money. That is in all cases most unsatisfactory evidence, on account of the facility, with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of the declaration. There are no corroborating circumstances, by any writing under his hand. In most of the cases there has been at least something in writing: some account; by which it appeared, that the fund was laid out. This case has not the circumstance, considered of weight in other cases, the inability of the husband to make the purchase with other funds; which was relied upon in *Ryal v. Ryal* (97). On the contrary this Plaintiff's husband was reputed a man of substance

(97) 1 *Atk.* 59. Stated by Sir *T. Clarke*, *Am. b.* 413; where that circumstance appears.

substance before the marriage; and upon the marriage he received 700*l.* with his wife; which was very nearly sufficient to pay for the houses purchased after the marriage. As to the first purchase, that was before the marriage; and as to that the allegation is only, that the debt contracted was paid off. The evidence of *Grainger*, which is represented as in a degree confirming that of *Mrs. Pedley*, instead of elucidating, involves the transaction in greater obscurity; for it is not true in fact, that she purchased the houses. It is not alleged, even, that the purchases were made by her agency. The stories told by the two witnesses seem to tend to different results; for the declaration according to *Grainger's* evidence imports, that the meaning of the husband all along was to make these purchases on behalf of the trust; which is the only sense, in which the wife could be said to make the purchase; whereas according to the other witness the husband never stated that intention to her; but always stated, that he had purchased; only telling her, it was with the trust money; and according to her it seems he meant the purchase to be upon his own account; giving his wife the deeds by way of security for the money; not to shew, that the houses were purchased upon her behalf. If his intention had been to make the purchases on behalf of the trust, it was strange uniformly to take the conveyance in his own name; instead of that of the trustee. However she positively swears as to each sum, that he said, it was the trust money. Her observation to him, that he must have a great deal of money, to make these purchases, was not very natural; considering the fact, before sworn to, that she had paid him 1000*l.*; and that he had received 700*l.* upon the marriage. That observation brings from him a farther declaration, as to all the purchases, that they were made with the trust money. Upon this evidence perhaps I should have been disposed either to allow the claim, or to direct an inquiry: but, if evidence

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dence of this sort could be proceeded upon, standing unsupported, and in some degree contradicted by the circumstances, it ought to stand wholly uncontradicted by other evidence. But the Plaintiff's declarations as to the money in the Bank breaks in entirely upon the case made by Mrs. *Pedley's* evidence; and cannot possibly be reconciled with it. That declaration by the Plaintiff, that she had a claim for 660*l.* of her money, supposed to be in the Bank at *Worcester*, cannot stand with the whole of that evidence; and I cannot divide it. That shews, at least, that the whole of Mrs. *Pedley's* evidence is too uncertain to be depended upon. I should be proceeding entirely in the dark, if after that I should declare, that either the whole or a part of these houses was purchased with the trust money.

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A case, *Wilson v. Foreman* (98), occurred to me, which, as stated in the Report, would have established this sort of principle; that, if a husband gets into his possession trust money, and afterwards purchases a real estate, the wife or trustee will have a claim upon that estate without shewing, that it was purchased with the trust money, or for the purposes of the trust. That case is very imperfectly stated in the Report. The fact was, that money was settled for the purpose of being laid out, as soon as conveniently might be after the marriage, in a convenient purchase, with the consent of the husband and wife or the survivor: in the mean time to be placed in the funds. The executor of the surviving trustee gave a Power of Attorney to the husband; who sold out the stock; and got the money. The circumstance of the bond does not appear. Soon afterwards he purchased an estate in *Kent*; and took a conveyance to a trustee. He also purchased an estate in *Yorkshire*; and took that to himself and his heirs. The claim of the wife

wife was upon that estate in *Yorkshire*. A reference was directed by Lord *Thurlow*, to inquire, whether the estate was purchased with part of the trust money, with an intention to settle the same, pursuant to the marriage articles: not only, whether it was purchased with the trust money. There was evidence in writing as to both points; for the husband after the agreement wrote to a Solicitor; desiring him to inspect the title; as the purchase was to be made with money settled upon his wife; desiring to have Counsel's advice; that she may be satisfied. In another letter he said, he should make the purchase; and vest the estate in trustees as soon as possible afterwards. There was also parol evidence of his intention to convey upon the trusts of the settlement. Therefore the Report was, that the husband purchased with part of the trust money, with the intention to convey according to the articles. That case therefore is not an authority for what is contended by the Plaintiff.

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The only remaining point is, whether the Plaintiff can be considered a specialty creditor. Upon what ground? It is said, there is a covenant by the husband to this effect; that he would not obstruct such direction, appointment, or disposition, as the wife should make under her power; but that he, his executors, &c. would do any act, to enable her thereunto, &c. Whether it was necessary, or not, is immaterial. The only professed object was to prevent his interfering with the power, given to her. But it is said, if I do not restore this to the trustee, the Plaintiff is obstructed; for there is nothing to dispose of. True: but that is wresting the covenant altogether from the purpose, that was in view; to apply it to a case, not at all foreseen; to make it amount to a covenant, that, if he borrowed the money, he would repay it. It might as well be said, that the preliminary covenant in this and every settlement, that the trustee shall

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shall stand possessed upon the trusts after mentioned, would have that effect. That would be wresting the covenant altogether from its natural meaning and true purport and object.

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The bill, so far as it ought to establish a lien, or, that the Plaintiff should be considered a specialty creditor, was dismissed (99). Her right to free bench was admitted.

(99) *Lewis v. Madocks*, post, Vol. XVII, 48. 1 *Ball & Beat*. 235.

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 20th.

Ante, Vol. IX,  
 399.

### MORICE v. THE BISHOP OF DURHAM.

Bequest, in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve, cannot be supported as a charitable legacy; and is therefore a trust for the next of kin.

THIS cause came on upon an appeal by the Defendant, the Bishop of *Durham*, from the decree of the *Master of the Rolls* (100).

Mr. *Richards* and Mr. *Martin*, in support of the Appeal.

The whole interest in this property is given to the Bishop of *Durham*, as a legatee: not merely by the appointment of him, as executor. The question may be considered in two points of view; either of which will sustain this disposition, at least as against the next of kin: 1st, as a good bequest to Charity: if not, 2dly, the Bishop has a right fairly to avail himself of it, to carry into execution the liberal and benevolent intention of the testatrix by a disposition among such objects as he may think answer the description; disclaiming the application of any part of the property to his own use.

If

(100) Reported ante, Vol. IX, 399; see the note, 406.

If this is a bequest to Charity, the generality of the description will not affect the disposition; and if that is the object, it is not necessary to point out any particular Charity. Charity, in the abstract, is a very difficult consideration. In our Law the sense of that word is almost as extensive as that, in which it is used by general authors. The Statute of *Elizabeth* (1) embraces a great variety of objects, that do not properly come within the ordinary meaning of the word "charity;" but fall under the description of "liberality," in its usual sense; as repairs of bridges, ports, &c. Money, directed to be applied to such objects, if not prevented by the Statute of *Geo. II* (2), would be applied in this Court, as a disposition to Charity. Though clearly not within the ordinary signification, it answers the description of Charity, connected with liberality. It is difficult to consider a gift to the poor of a parish as charity; for, as the Law is now constituted, that is a gift in ease of the land-owners of the parish; the tenant paying so much less rent in proportion to the poor-rates and the other taxes. These words are equivalent to "charity," in the legal acceptance. The authorities have established many objects, as charitable, which are not within the Statute of *Elizabeth* (3); as the establishment of a Jesuba (4), an illegal establishment, upon a supposed general charitable intention; so, the establishment of the *Tancred* students and the *Setonian* prizes, the disposition in *Howse v. Chapman* (5) for beautifying the city of *Bath*, are not within the Statute; and, though liberal, cannot be described as charitable, objects, in the strict sense. But, upon the authorities almost every thing, from which the public derive benefit, may be considered a charity. Suppose, the testatrix had expressed the object of promoting

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(1) Stat. 43 *Eliz.* c. 4.

(4) *De Costa v. De Paz*,

(2) Stat. 9 *Geo. II*, c. 36.

*Amb.* 228.

(3) Stat. 43 *Eliz.* c. 4.

(5) *Ante*, Vol. IV, 542.

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moting erudition and science: various objects might be suggested; as the increase of Fellowships, the *British Museum*, &c. Why should such dispositions be discouraged? Lord Chief Justice *Wilmot* in his argument upon the case of *Downing College* (6) speaks of the advancement of useful learning and science as a meritorious object.

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The case upon Mr. *Bradley's Will* (7) may be considered as bearing hard upon this question; as that disposition might perhaps in some respects be construed Charity. That case, though frequently cited, has not been mentioned with great respect by any Judge: nor was it satisfactory to the Bar. Upon all the cases upon charity, which were stated by your Lordship in *Moggridge v. Thackwell* (8), that must be considered a single case, not confirmed by any other; and, not merely unsupported, but contradicted by most. There was not more difficulty in arranging that design than the mission to *America* and several others. The distinction between this case and *Moggridge v. Thackwell* is, that in this instance the person, in whom the confidence is placed, is living; and can execute the trust.

In considering the terms used in this Will, "benevolence" is that sort of good-will, peculiarly intended by "charity:" especially if it is collected from the Statute of *Elizabeth* (9): but whether in the extended, or the confined, sense, "benevolence" has at least the same latitude;


(6) *The Attorney General v. Lady Downing*, Wilm. 1. Amb. 550, 571. *The Attorney General v. Bowyer*, ante, Vol. III, 714. V, 300. *The Attorney General v. Vigor*, VIII, 250.

(7) *Brown v. Yeall*, stated ante, Vol. VII, 50, in the note to *Moggridge v. Thackwell*.

(8) 3 Bro. C. C. 517. Ante, Vol. I, 464. VII, 36.

(9) Stat. 43 Eliz. c. 4.


latitude; and is in truth only charity, in an enlarged sense. Dr. *Johnson* defines "benevolence" to be *charity* done or given. The term "liberality" is certainly more loose: but in the sense, in which it is used here, coupled with a word, clearly importing Charity, in a Will, reposing this high trust in the Bishop of *Durham*, it cannot be referred to such subjects, as it was in the argument at the *Rolls*: horse-racing, &c. Suppose the words were "liberality and charitable purposes:" the construction must have been a liberal application to such charitable purposes as the executor should think fit; extending it beyond the constrained sense of charity. There are many most proper and legitimate objects of that benevolent and liberal charity, in the enlarged sense, received by the Law of *England*; though not within the \*confined sense. But if "liberality" is to be considered as totally distinct from "charity," yet "benevolence" intimates, that to some extent objects of charity are intended. The true construction is charitable objects, extended by the effect of the other word.

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If the decree is right in this respect, then the Bishop is himself the legatee; disclaiming however any intention of application to private purposes of his own. This point was not much touched at the *Rolls*. If personal property is bequeathed to a person, with a request, that he will at his death bequeath it among the relations of the original testator, that is now clearly established to be a trust, upon *Pierson v. Garnett* (10.), and many other cases. But, supposing the objects were not certain, and could not be defined, the legatee would be entitled for his own use. If the bequest was to the Bishop, to distribute to such objects as his disposition should suggest

(10) 2 *Bro. C. C.* 38, 226. *Malim v. Keighley*, II, 333,  
 See ante, Vol. VIII, 380. 529, and the note, I, 272.

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gest to him: the objects not being defined, he must take the property himself. This Will makes a considerable provision for the next of kin.

The *Attorney-General* and Mr. *Mitford*, against the Decree.

The *Attorney-General* stated, that he appeared officially for those, whose interests the *Attorney-General* ought to support; and should have felt himself bound to appeal, if the other Defendant had not appealed; considering this a question of so much doubt, that the first decision, at the *Rolls*, ought not to bind it.

This is a disposition substantially to charity; and, if so, there is no such uncertainty, as will defeat it. The only question could be, whether the execution should be in this Court, or by the King's Sign Manual: but clearly, if it can be brought up to a design of charity, the uncertainty of the particular object will not defeat the general purpose. It is not necessary to make use of the word "charity," or to point out some specific object, falling within the range of that word. Any other words, enabling the Court with a sufficient degree of certainty to collect the intention, are equivalent. It is not necessary to name any individual legatee, if he is distinctly pointed out in any way; and "charity" is a legatee, favoured more than any other; and therefore a general description is sufficient. It is more easy to say, what does not, than what does, come within the description of "charity." The sense, in which that word is used in the Christian religion, is most comprehensive; comprising every moral virtue and duty. The objects, this Will has in view, are objects both of benevolence and liberality: the words restrained, so as to exclude all selfish views, and all purposes of mere ostentation, particularly those attended with cruelty: such a disposition of the words in effect coming nearer the true nature of "charity."

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“charity.” Suppose, a *Roman Catholic* bequeathed his personal estate to his Confessor, to be disposed of in such purposes of charity as he should think proper: it could not be doubted, that superstitious uses, which this Court would not permit, were intended; as masses, &c.: but that probable object would not vitiate the charitable design; and the effect would be, that the Court would superintend the disposition, and not destroy it. If the word “liberality” is not to be limited, so as to prevent an extravagant construction, the word “benevolence” is sufficiently large to signify “charity;” and, if that is one of the objects, it shall not be defeated by being coupled with another. At least under the word “benevolence” the bequest must avail to some extent; and upon the principle of *The Attorney-General v. Dooley* (11), there being two objects, half ought to be given to one; and half to the other.

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Mr. Romilly, Mr. Bell, and Mr. Wingfield, for the Plaintiffs, the next of kin, in support of the Decree.

This residue is given to the Bishop of *Durham* upon a trust so vague and indefinite, that it cannot be executed; and therefore there is a resulting trust for the next of kin. The first question, whether this is a trust, was at the *Rolls* taken to be clear.

*The Lord* CHANCELLOR.

If a testator expressly says, he gives upon trust, and says no more, it has been long established, that the next of kin will take. Then, if he proceeds to express the trust, but does not sufficiently express it, or expresses a trust, that cannot be executed, it is exactly the same as if he had said, he gave upon trust, and stopped there;

as

(11) 4 *Vin.* 485. 2 *Eq. Ca.* gister's Book, ante, Vol. VII, 58, in the note.  
40. 194. Stated from the Re-

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as in *The Bishop of Cloyne v. Young* (12). There is no difficulty upon that. In *Pierson v. Garnett* (13) and the other cases of that sort, the question was, whether the testator had said, he gave upon trust; and the decision was, that he had; as the object and the subject were sufficiently described: but, if he had used the word "trust," there could be no doubt, the Court must have held, that he meant trust.

For the Plaintiffs.

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Then, upon the second question, the nature of the trust: it must be admitted, that if the bequest is in trust for charity, it is no objection, that the charity is not particularly defined: neither is it necessary, that the testator should use the word "charity." The question always is, whether he has given to a charity; and therefore in this case it must be, what is the meaning in a Court of Justice of these two words; which, as there is no decision upon it, is a question rather of philology, than of law. It is said, the word "charity" has a most enlarged sense; considered, as it is used in the Gospel, as comprehending every virtuous affection, of which the mind is capable. But that is not the construction put upon it in this Court; the sense, in which your Lordship is to consider it, and in which it is used by mankind in general. Dr. *Johnson* does not say, "benevolence" is synonymous with "charity." He states four senses, in which the word is used: "disposition to do good: kindness: charity: good-will." "Charity" is only one of the senses, in which he states this word to be used by good authors. A large establishment, provided by a Peer for his son upon marriage, is an act of benevolence, not charity. If a son shews his gratitude to his father by kindness, attention to him in sickness, by relieving his difficulties, that is benevolence; not charity, in the common use of that word.

But

(12) 2 *Ves.* 91.

(13) 2 *Bro. C. C.* 38, 226.

But it is a new rule of criticism, that a subsequent word, of more extensive signification, shall not enlarge a preceding, more limited, word; but, that the sense of the latter shall be confined by the former. Dr. *Johnson's* statement upon the word "liberality" and his example are taken from *Shakespeare*. That word in *English* has precisely the same sense as the *Latin* word. There are some definitions of that word in *Latin*; and Dr. *Johnson* had that in view, when giving the definition by the word "munificence." *Cicero* has the following passages:

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"(14) *Justitia - - - - et huic conjuncta beneficentia,*  
" *quam eandem vel benignitatem vel liberalitatem appel-*  
" *lari licet.*"

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"(15) *Deinceps (ut erat propositum) de beneficentiâ*  
" *ac liberalitate dicatur: quâ quidem nihil est naturæ*  
" *hominis accommodatius; sed habet multas cautiones.*  
" *Videndum est enim primum, ne obsit benignitas & iis*  
" *ipsis, quibus benignè videbitur fieri, et ceteris: de-*  
" *inde ne major benignitas sit quam facultates: tum ut*  
" *pro dignitate cuique tribuatur. Id enim est justitæ*  
" *fundamentum; ad quam hæc referenda sunt omnia.*  
" *Nam et qui gratificantur cuipiam quod obsit illi, cui*  
" *prodesse velle videantur, non benefici, neque libera-*  
" *les, sed perniciosi assentatores judicandi sunt; et*  
" *qui aliis nocent, ut in alios liberales sint, in eadem*  
" *sunt injustitiâ, ut si in suam rem aliena conver-*  
" *tant.*"

In another part (16), he describes the different kinds of liberality. The one, he says, may be called prodigal: the other liberal.

"Prodigi,

(14) *Cic. de Off. Lib. I.*  
Sec. 8.

(15) *Ibid. Sec. 14.*

(16) *Ibid. Lib. II. Sec. 16.*

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“ Prodigii, qui epulis et viscerationibus et gladiatorum  
 “ muneribus, ludorum venationumque apparatu pecunias  
 “ profundunt in eas res, quarum memoriam aut brevem  
 “ aut nullam omnino sunt relicturi: liberales autem qui  
 “ suis facultatibus aut captos a prædonibus redimunt, aut  
 “ æs alienum suscipiunt amicorum, aut in filiarum collo-  
 “ catione adjuvant, aut opitulantur, vel in re querendâ  
 “ vel augendâ.”

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But, though he states that to be his opinion, he says,  
 other philosophers have differed from him; and, noticing  
 the opinion of *Theophrastus*, proceeds thus:

“ Mihi autem ille fructus Liberalitatis, ejus pauci  
 “ exempla posui, multo et major videtur et certior.”

He must, therefore, have understood those to be in-  
 stances of liberality, but not in so certain a sense as he  
 has given.

There are authorities in the *English* language: but it  
 is not accurately described in any *English* author. One,  
 of great authority, Dr. *Paley* (17), after describing the  
 different species of charity, proceeds thus:

“ Having thus described several different exertions of  
 “ charity, it may not be improper to take notice of a spe-  
 “ cies of liberality, which is not charity in any sense of the  
 “ word: I mean the giving of entertainments or liquor for  
 “ the sake of popularity: or the rewarding, treating, and  
 “ maintaining, the companions of our diversions; as  
 “ hunters, shooters, fishers, and the like. I do not say,  
 “ that this is criminal: I only say, that it is not charity;  
 “ and that we are not to suppose, because we give, and  
 “ give to the poor, that it will stand in the place, or  
 “ supersede

“supersede the obligation, or more meritorious and dis-  
“interested bounty.”

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That shews the proper use of “liberality,” as con-  
tradistinguished from “charity.” The words there-  
fore are not synonymous. But the testatrix, selecting  
the former word, and anxiously avoiding the latter,  
must have meant something very different from “cha-  
“rity.” The meaning of “liberality” is so exten-  
sive, that it is impossible to define it. Upon that very  
ground this disposition is void; and for that very reason  
the Court cannot compel the executor to perform the  
trust; or ascertain, when there is a breach. There  
are various instances of liberality, that cannot be de-  
scribed as charity: the establishment of a Cabinet of  
Natural History, Anatomical Exhibitions, Galleries of  
Pictures, to be open to the public: a legacy to the  
African Society, for acquiring information in the interior  
of *Africa*, to contribute to raise the degraded state of  
society in that part of the world: all these are in-  
stances of liberality; but not charity. The instances,  
mentioned at the *Rolls*, were mentioned only for the  
purpose of shewing, that the sense of “liberality” is  
so vague, that it varies with the fashion of the time.  
Exhibitions of combats by gladiators and wild beasts  
were once considered as within that description. The  
passage in *Cicero*, and that, cited by Lord Chief Jus-  
tice *Wilmot* (18) from the *Digest* (19), shew, they were  
so considered by philosophers of great name. It must  
depend much upon the person to make the distribution;  
and though an improper application by the Bishop can-  
not be supposed, there can be no security against the  
disposition of the heir. The legislature of this coun-  
try once thought, that the establishment of prizes for  
running horses was an object of liberality; and at this  
time

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(18) *Wilm.* 53.

(19) *Dig.* 33. *Tit.* 2.

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time objects might perhaps be selected, having, in the opinion of many the most pernicious tendency. Some of the objects, that have been mentioned on the other side as objects of charity, are not so; but are proper objects of liberality; and of that nature would be an application of this property to the Plaintiff, a clergyman with a large family; which could not come under \*the description of charity; according to *Moggridge v. Thackwell*; where an application of very large property among the relations of the testatrix, in moderate, but not indigent, circumstances, Lord *Rosslyn*, with great approbation, and a strong wish to support that plan, thought impossible, as not within any sense charity.

There are four objects, within one of which all charity, to be administered in this Court, must fall: 1st, relief of the indigent; in various ways: money: provisions: education: medical assistance; &c.: 2dly, the advancement of learning: 3dly, the advancement of religion; and, 4thly, which is the most difficult, the advancement of objects of general public utility. A just application of this property within the meaning of this testatrix will not fail within any of those objects: for instance, assisting individuals, not in a state of indigence, but possessing the comforts of life, is liberality; but not charity in any of those senses. The object in *Howse v. Chapman* (20.) was established, not as charity, but as being clear, and defined, and not illegal; and so the object of establishing cabinets of coins, medals, &c. to be open to the public, would not be liable to objection. The objection in this instance is, not, that this is illegal, but, that it is so vague and uncertain, that it cannot be carried into execution. Suppose, the trustee was to divert the property to some of those doubtful purposes, which have been alluded to: is the Court to direct an inquiry;

(20) Ante, Vol. IV, 542.

inquiry; and what is to be the criterion? It is not very easy to determine, where "generous profusion," according to Dr. *Johnson's* definition, ends, and prodigality begins.

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In *Brown v. Yeall* (21) the object was held so vague, that it could not be executed: not, that the distribution of such books as were in the view of that testator was a vague object: but the mode was not pointed out. It was thrown entirely upon the Court of Chancery to say, who were the persons, what the books, and what the manner of distribution. Though the general object was pointed out, yet its nature was vague and uncertain. No case has yet overturned that decision; and it goes infinitely beyond this case: the object in Mr. *Bradley's* Will being much more specific. The object in *Townley v. Bedwell* (22), independent of the objection upon the Statute (23), would have been good, but for its vagueness and uncertainty; which was the principal ground. In *Gwynn v. Cardon*, in the Court of Exchequer a few years ago, a sum of money was given by Will, to be employed in giving Prizes by the President of the Royal Academy for the best examples of the Fine Arts, Sculpture and Painting, or one of them; but it was expressed in so vague a way, that the Court held, it could not be executed, and was void. *The Attorney-General v. Whorwood* (24), after the decision by Lord *Hardwicke*, came as Lord *Redesdale* states in the note (25) to *Corbyn v. French*, before Lord *Northington*; who thought the disposition not good as a charitable bequest, and declared the whole void; though clearly many of the objects were charitable. That case therefore proves, that this cannot be divided; if liberality cannot be construed

(21) Ante, Vol. VII, 50, n.

(24) 1 *Ves.* 534.

(22) Ante, Vol. VI, 194.

(25) Ante, Vol. IV, 434.

(23) Stat. 9 *Geo.* II, c. 36.

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strued charity; for the Court cannot ascertain, how much goes to one object, and how much to the other. The word "benevolence" certainly may be used with a view to charity: but the other word seems intended to explain that, and to prevent misapprehension; shewing, \* charity was not intended; but something in a more enlarged sense.

*The Lord CHANCELLOR.*

In *Brown v. Yeall* Lord *Thurlow* did not explain himself fully. The words were loose enough; and, I remember, Lord *Thurlow* said in the course of the argument, he did not know, what books had a tendency to promote the happiness of mankind. But, the testator, having looked to virtue and religion, and connected them with the description of his purpose, as a charitable purpose, and left the execution to this Court, I should question, whether he should not have been understood to intend upon the whole such purpose as in the meaning of this Court would be charitable. As to *The Attorney-General v. Whorwood*, the charity was wholly disappointed; as every part was connected; as in the instance of a bequest to educate children; if one part of the purpose is first to build a school (26).


A Charity,  
 bad in part,  
 must fail as to  
 the whole; if  
 every part is  
 connected: as  
 a bequest to  
 educate chil-  
 dren, the first  
 part of the  
 plan being to  
 build a school.

*Mr. Richards*, in Reply.

Some of the objects, pointed out by *Cicero*, are in our law objects of charity; as the redemption of prisoners: the marriage of poor maidens. There is nothing in the word "liberality" inconsistent with charity; and "benevolence" has the same meaning. That species of bounty, not, strictly speaking, charity, bestowed upon a person with a considerable income apparently, but a large family, and from circumstances not equal to bring up that family, according to the rank he fills in life, is  
 more

(26) *Grieves v. Case*, ante, Vol. I, 548; and the note, 554.

more properly charity than mere bounty to the poor. As to the terms, used in Mr. *Bradley's Will* (27), many misguided people have lately thought books of the most mischievous tendency conducive to the happiness of mankind. But the Court will judge of the intention; and \* if a good purpose can be discerned, will cut down that part, which is absurd and mischievous. That case was not pressed farther; as it was thought, the law would make the best disposition. In *The Attorney-General v. Whorwood* that part, that was charitable, was only an incident; and followed the principal; which was void. In the Act of Parliament, giving plates for racing, the object was not liberality, but the encouragement of the breed of horses.

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*The Lord CHANCELLOR.*

This, with the single exception of *Brown v. Yeall* (28), is a new case. The questions are, 1st, Whether a trust was intended to be created at all? 2dly, Whether it was effectually created? 3dly, If ineffectually created, whether the Defendant, the Bishop of *Durham*, can according to the decisions, and upon the authority of those decisions, take this property for his own use and benefit. As to the last, I understand, a doubt has been raised in the discussion of some question, bearing analogy to this, in another Court; how far it is competent to a testator to give to his friend his personal estate, to apply it to such purposes of bounty, not arising to trust, as the testator himself would have been likely to apply it to. That question, as far as this Court has to do with it, depends altogether upon this: if the testator intended, but

If a trust is intended, but meant is not expressed; or is ineffectually created, or fails, the next

(27) *Brown v. Yeall*, ante, Vol. VII, 50, n.

(28) Ante, Vol. VII, 50, n.

of kin are entitled; but if the person taking has a discretion, whether to make the application or not, it is an absolute gift, not a trust.

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meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take himself, it must be upon this ground, according to the authorities; that the testator did not mean to create a trust; but intended a gift to that person for his own use and benefit; for if he was intended to have it entirely in his own power and \*discretion, whether to make the application or not, it is absolutely given; and it is the effect of his own Will, and not the obligation imposed by the testament: the one inclining, the other compelling him, to execute the purpose. But, if he cannot, or was not intended to, be compelled, the question is not then upon a trust that has failed, or the intent to create a trust: but the Will must be read, as if no such intention was expressed, or to be discovered, in it (29).


No trust upon words of request or recommendation, unless the objects and the subject are certain.

*Pierson v. Garnett* (30), and the other cases of that class, do not bear upon this in any degree; for the question, whether a trust was intended, arose from two or three circumstances; which must all concur, where there is no express trust. *Prima facie* an absolute interest was given; and the question was, whether precatory, not mandatory, words imposed a trust upon that person; and the Court has said, before those words of request or accommodation create a trust, it must be shewn, that the object and the subject are certain; and it is not immaterial to this case, that it must be shewn, that the objects are certain. If neither the objects nor the subject are certain, then the recommendation or request does not create a trust; for of necessity the alleged trustee is to execute the trust; and the property being

(29) Post, Vol. XIV, 370,  
*Paice v. The Archbishop of*  
*Canterbury.*

(30) 2 Bro. C. C. 38, 226.  
*Ball v. Vardy*, ante, Vol. I,  
270; and the note, 272.

being so uncertain and indefinite, it may be conceived, the testator meant to leave it entirely to the will and pleasure of the legatee, whether he would take upon himself that, which is technically called a trust. Wherever the subject, to be administered as trust-property, and the objects, for whose benefit it is to be administered, are to be found in a Will, not expressly creating trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the Court as evidence, that the mind of the testator was not to create a trust; and the difficulty, that would be \* imposed upon the Court to say, what should be so applied, or to what objects, has been the foundation of the argument, that no trust was intended.


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But the principle of those cases has never been held in this Court applicable to a case, where the testator himself has expressly said, he gives his property upon trust (31). If he gives upon trust, hereafter to be declared, it might perhaps originally have been as well to have held, that, if he did not declare any trust, the person, to whom the property was given, should take it. If he says, he gives in trust, and stops there, meaning to make a codicil, or an addition to his Will, or, where he gives upon trusts, which fail, or are ineffectually expressed, in all those cases the Court has said, if upon the face of the Will there is declaration plain, that the person, to whom the property is given, is to take it in trust; and, though the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, the party taking shall be a trustee; if not for those, who were to take by the Will, for those, who take under the disposition of the Law. It is impossible therefore to contend, that, if this is a trust ineffectually expressed, the Bishop of *Durham* can hold for his own benefit,

(31) 2 Vcs. & Bea. 298,



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benefit. I do not advert to what appears upon the record of his intention to the contrary, and his disposition to make the application; for I must look only to the Will, without any bias from the nature of the disposition, or the temper and quality of the person, who is to execute the trust.

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Where the principal part of a charity fails, the whole fails; though part would have been good, if unconnected; as a bequest to an Infirmary, or a School, connected with a purpose of building it.

The next consideration is, whether this is a trust effectually declared; and, if not as to the whole, as to part. I put it so; as it is said, if the word "benevolence" means charity, and "liberality," means something different from that idea, which in a Court of justice we are obliged to apply to that word "charity," (and, I admit, we are obliged to apply to it many senses, not falling within its ordinary signification) there is a ground for an application in this case partially, if it cannot be wholly, to charity. It does not seem to me upon the authorities, particularly *The Attorney General v. Whorwood* (32), that the argument for a proportionate division, or a division of some sort would be displaced. I take the result of that case to be, that the substratum of that charity failed; and all those partial dispositions, that would have been good charity, if not connected with that, failed together with it. It has been decided upon that principle, that, though money may be given to an infirmary or a school, yet, if that bequest is connected with a purpose of building an infirmary or school, and the money is then to be laid out upon it, so built, the purpose, which is the foundation, failing, the superstructure must fail with it. *The Attorney General v. Doyley* (33) is almost the only case, that has been cited for a proportional division. The testator expressly

(32) 1 Ves. 534. Ante, Ab. 194. Stated from the *Grieves v. Case*, Vol. I, 548, and the note, 554. *Register's Book*, in the note, ante, Vol. VII, 58.

(33) 4 Vin. 485. 2 Eq. Ca.

expressly directed the trustees to dispose of his estate to such of his relations, of his mother's side, who were most deserving, and in such manner and proportions as they should think fit to such charitable use as they should think most proper and convenient; and the Court, which has taken strong liberties upon this subject of charity, though the manner and proportion were left to certain individuals, held, that equality is equity, and there should be an equal division; but it is expressly declared, that those, who took, were persons, who could take under a bequest to charitable uses; and there was no difficulty in that case in saying, those \* words must be construed according to the habit and allowed authorities of the Court.

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The only case, decided upon any principle, that can govern this, is *Brown v. Yeall* (34); which applies strongly. I do not trust myself with the question, whether the principle was well applied in that instance: but the decision furnishes a principle, which the Court must endeavour well to apply in cases, that occur: I do not hesitate to say, I entertain doubt, not of the principle, upon which that case was decided, but, whether it was well applied in that instance. Mr. *Bradley* was a very able lawyer: yet he mistook his way; as Serjeant *Aspinall* had not long before. Mr. *Bradley* gave a great portion of his fortune, to accumulate for many years; and meaning, that it should be disposed of to charitable purposes, constituted a fund; expressly stating, that his purpose was a charitable purpose; and confirming that by directing that charitable purpose to be carried on, as to the mode of executing it, by that Court, which according to the constitution of the country ordinarily administers property, given to charitable uses. In his opinion therefore, independent of particular authority, there

(34) Ante, Vol. VII, 50, note.

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there was a principle, suggested by all other cases of trust, that if a trust was declared in such terms, that this Court could not execute it, that trust was ill-declared, and must fail, for the benefit of the next of kin. The principle, upon which that trust was ill-declared, is this. As it is a maxim, that the execution of a trust shall be under the controul of the Court, it must be of such a nature, that it can be under that controul; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust: a trust therefore, which, in case of mal-administration \* could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the Court can neither reform mal-administration, nor direct a due administration. That is the principle of that case. Upon the question, whether that principle was well applied in that instance, different minds will reason differently. I should have been disposed to say, that, where such a purpose was expressed, it was not a strained construction to hold, that the happiness of mankind intended was that, which was to be promoted by the circulation of religious and virtuous learning: and, the testator having stated that to be the charitable purpose, which unquestionably was so, the distribution of books for the promotion of religion, the Court might have so understood him; and the testator having not only called it a charitable purpose, but delegated the execution to this Court, ought to be taken to have meant that.

[ \* 540 ]

Upon these grounds, in a subsequent case (36), as to the *Welch* charities, it appeared to me too much, considering the Society in this country for the Propagation of the Gospel, &c. to say, a trust for the circulation of  
 bibles,

(36) *The Attorney General v. Stepney*, ante, 22.

bibles, prayer-books, and other religious books, was not good. Then, looking back to the history of the Law upon this subject, I say, with the *Master of the Rolls* (37), that a case has not been yet decided, in which the Court has executed a charitable purpose, unless the Will contains a description of that, which the Law acknowledges to be a charitable purpose; or devotes the property to purposes of charity in general. Upon those cases, in which the Will devotes the property to charitable purposes, described, observation is unnecessary. With reference to those, in which the Court takes upon itself to say, it is a disposition to charity, where in some the mode is left to individuals, in others individuals cannot select either the mode, or the objects, but it falls upon the King, as *parens patriæ*, to apply the property, it is enough at this day to say, the Court by long habitual construction of those general words has fixed the sense; and, where there is a gift to charity, in general, whether it is to be executed by individuals, selected by the testator himself, or the King, as *parens patriæ*, is to execute it (and I allude to the case in *Levinz* (38),) it is the duty of such trustees, on the one hand, and of the Crown, upon the other, to apply the money to charity, in the sense, which the determinations have affixed to that word in this Court: viz. either such charitable purposes as are expressed in the Statute (39), or to purposes having analogy to those. I believe, the expression "charitable purposes," as used in this Court, has been applied to many Acts described in that Statute, and analogous to those, not because they can with propriety be called charitable, but as that denomination is by the Statute given to all the purposes described.

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The Court has never executed a charitable purpose, unless described by the Will, or the property devoted to charity in general.

In the latter case the application, either by the trustees, or the Crown, must be to purposes expressed in the stat. 43 *Eliz.* c. 4, or analogous to those.

The

(37) Ante, Vol. IX, 406.

*v. Matthews*, 2 *Ler.* 167.

(38) *The Attorney-General*

(39) Stat. 43 *Eliz.* c. 4.

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The question then is entirely, whether this is according to the intention a gift to purposes of charity in general, as understood in this Court: such, that this Court would have held the Bishop bound, and would have compelled him, to apply the surplus to such charitable purposes as can be answered only in obedience to decrees, where the gift is to charity, in general: or \*is it, or may it be according to the intention, to such purposes, going beyond those, partially, or altogether, which the Court understands by "charitable purposes;" and, if that is the intention, is the gift too indefinite to create an effectual trust, to be here executed? The argument has not denied, nor is it necessary, in order to support this decree, that the person, created the trustee, might give the property to such charitable uses, as this Court holds charitable uses within the ordinary meaning. It is not contended, and it is not necessary, to support this decree, to contend, that the trustee might not consistently with the intention, have devoted every shilling to uses, in that sense charitable, and of course a part of the property. But the true question is, whether, if upon the one hand he might have devoted the whole to purposes, in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this Court construes those words; and, if according to the intention it was competent to him to do so, I do not apprehend, that under any authority upon such words the Court could have charged him with mal-administration, if he had applied the whole to purposes, which according to the meaning of the testator are benevolent and liberal: though not acts of that species of benevolence and liberality, which this Court in the construction of a Will calls charitable acts.

The

The question therefore resolves itself entirely into that; for I agree, there is no magic in words; and if the real meaning of these words is charity or charitable purposes, according to the technical sense, in which those words are used in this Court, all the consequences follow: if on the other hand the intention was to describe \*any thing beyond that, then the testator meant to re-  
pose in the Bishop a discretion, not to apply the property for his own benefit, but that would enable him to apply it to purposes more indefinite than those, to which we must look; considering them purposes, creating a trust; for, if there is as much of indefinite nature in the purposes, intended to be expressed, as in the cases, to which I first alluded, where the objects are too uncertain to make recommendation amount to trust, by analogy, the trust is as ineffectual: the only difference being, that in the one case no trust is declared; and the recommendation fails; the objects being too indefinite: in the other, the testator has expressly said, it is a trust; and the trustee consequently takes, not for his own benefit, but for purposes not sufficiently defined to be controlled and managed by this Court. Upon these words much criticism may be used. But the question is, whether, according to the ordinary sense, not the sense of the passages and authors alluded to, treating upon the great and extensive sense of the word "charity," in the Christian religion, this testatrix meant by these words to confine the Defendant to such acts of charity or charitable purposes as this Court would have enforced by decree, and reference to a Master. I do not think, that was the intention; and, if not, the intention is too indefinite to create a trust. But it was the intention to create a trust; and the object being too indefinite, has failed. The consequence of Law is, that the Bishop takes the property upon trust to dispose of it, as the Law will dispose of it: not for his own benefit, or any purpose this Court can effectuate. I think, therefore, this decree is right.

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The Bishop of  
DURHAM.

[ \*543 ]

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The Decree was affirmed.

## BAKER v. MELLISH.

## BAKER v. GODFREY.

## BAKER v. MILLS.

1805.

March 21st,

22d, 26th.

Equity for a landlord, against whom Judgment had been obtained in Ejectment by his own negligence, to restrain his tenant, and those, to whom he had attorned, from setting up the lease against his Ejectment; though only a year and three quarters of the Term was unexpired; and it is not necessary, that the Ejectment should be brought before the Bill actually filed. Demurrer, good to the relief, is good to the discovery, sought with a view to the relief.

**T**HE bill stated, that the Plaintiff, being seised in fee of lands in the *Isle of Dogs*, on the 28th of *January*, 1800, demised to the Defendant *Mills* for seven years, at the yearly rent of 50*l.*; under which demise he was possessed; and paid rent to the Plaintiff until the 25th of *December*, 1802. *Peter Mellish*, deceased, and the Defendants *William Mellish* and *William Godfrey*, or one of them, in *Michaelmas* Term 1804 brought an ejectment. The Plaintiff caused himself and *Mills* to be made Defendants; and entered into the usual rule to confess lease, entry, and ouster: but knowing, that none of the said parties had any title, and thinking, no case could be made for them, he was inattentive to the defence; in consequence of which, and by shewing title to some adjoining land, the lessors of the nominal Plaintiff obtained a verdict; and judgment was entered up; and a writ of possession issued: but, instead of *Mills* being turned out of possession, the Defendants or some or one of them prevailed on him to attorn to them or one of them; and he is now in possession under such attornment either to *William Mellish*, as having survived *Peter Mellish*, or to *Godfrey*.

The bill farther stated the death of *Peter Mellish*; leaving *William Mellish* his heir at law and devisee in fee; and the Plaintiff, intending to try his title by bringing an ejectment, and being advised, that his lease to *Mills* might be set up against, and defeat, such action, applied to *Mellish* and *Mills*, to know, whether *Mellish* would try the title on the merits, or would avail himself of the lease; and, whether *Mills* would give up the lease;

lease; the Plaintiff offering to grant him a new lease in the event of a verdict for the Plaintiff. But the Defendants *Mellish* and *Mills* decline to waive the lease, and *Godfrey* abets or concurs with them therein; and they threaten and intend, whenever the Plaintiff shall bring a new ejectment on any demise of his own, to set up the said lease as a defence, and thereby defeat the Plaintiff of his remedy to recover possession.

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The prayer of the bill was, that the Defendants *Mellish* and *Godfrey* may set forth, what title they have in the land demised; and may be restrained from setting up the lease to *Mills*, as a defence to any ejectment to be brought by the Plaintiff, and in which any demise shall be laid on his part, to prevent him from trying his title and recovering possession of the premises, demised to *Mills*.

To this bill each of the Defendants put in a general demurrer. Upon the argument it appeared, that the lease to *Mills* commenced at *Christmas* 1799: so that a year and three quarters only remained unexpired.

Mr. *Romilly* and Mr. *Owen*, in support of the Demurrer.

The obstacle, which is now opposed to the Plaintiff, did not stand in his way, when the question was tried in the ejectment; and exists now in consequence of his own negligence. The Plaintiff has other remedies. He may try this question by distress. He has also the remedy by assize. An attornment to a stranger is a disseisin at the election of the landlord. He may therefore put an end to the lease; availing himself of the attornment, which is material, though after judgment. If the writ of possession be executed, there is no defence against an action of covenant for the rent; to which there are only two pleas in bar: eviction, or

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attornment



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attornment by coercion. In *Roll's Abridgment* (40) it appears, that, if a tenant attorns to a stranger without coercion, it is a disseisin at the election of the landlord. It is true, Lord *Mansfield* in *Taylor v. Horde* (41) says, a person, in possession under a judgment in ejectment, cannot be a disseisor at the election of the true owner: but a reason is given, which cannot stand; that it cannot be said *injustè and sine judicio intravit*. *Mills* at all events is a disseisor at the election of the Plaintiff: though the persons, who obtained the judgment, are not. If the action of ejectment is a substitute for the assise of *Novel Disseisin*, it must have the same effects. The tenant, having by his attornment become tenant to another person, cannot controvert in ejectment the title of his original landlord, by setting up his lease in ejectment, shewing, he is tenant to him, and not to the other, to whom he attorned. Certainly if a term is outstanding in a third person, not constituting the relation of landlord and tenant, the law is settled in opposition to the case of *Doe on the demise of Bristowe v. Pegge* (42): but as to the parties themselves, as between whom the term immediately creates the relation of landlord and tenant, it is competent to a Court of law to make regulations between them, at least with reference to the very deed, that constitutes the relation between them; of which deed the Plaintiff availed himself to come to the Court to defend the former ejectment. A Court of Law is not by the cases, that have over-ruled *Doe on the Demise of Bristowe v. Pegge*, deprived of the authority to make regulations for this purpose between the parties. Lord *Mansfield* (43) makes these observations upon ejectments:

(40) 1 *Roll. Ab.* 659, pl. 8. See ante, Vol. VI, 184; and

(41) 1 *Bur.* 60. See page 114. the references in the note.

(43) 3 *Bur.* 1294.

(42) 1 *Term Rep.* 750, n.

ments: "The control the Court has over the judgment  
 "against the casual ejector enables them to put any  
 "terms upon the Plaintiff, which are just. He was  
 "soon ordered to give notice to the tenant in possession. 1805.  
 "When the tenant in possession asked to be admitted  
 "Defendant, the Court was enabled to add conditions; *BAKER*  
 "and therefore obliged him to allow the fiction, and go *v.*  
 "to trial upon the real merits." *MELLISH, &c.*

This case must continually happen; as for this purpose there is no difference between a term for years and a tenancy from year to year. Another ground is the short period the term has to run. Though the Court will remove a long term out of the way of the trial of an ejectment, they will not assist the impatience of the Plaintiff; where he will be prevented for so inconsiderable a time. The Court will not interfere against so trivial an inconvenience; upon the same principle, which has produced the rule, that the Court will not interpose upon a subject of inconsiderable value: though the equity is clear: the limit in this Court being 10*l*.

*The Lord CHANCELLOR.*

Has there ever been an instance of a bill, in which the Plaintiff states, that he has not brought an ejectment; desiring, that, whenever he shall bring one, though perhaps he never may, not averring, that he will, the lease shall not be set up?

*Mr. Hollist and Mr. Gregg, for the Plaintiff.*

Until the decision of this cause the Plaintiff cannot bring an ejectment with effect; as the term may be set up at law. The duration of the term to be removed, whether long or short, cannot be of consequence. It is impossible for the lessor ever to say, his lease should not be set up against him. In some late cases in the

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Court

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v.  
**MELLISH, &c.** Court of King's Bench even a term in a third person has prevented the Plaintiff's recovery. This is the case of a tenant, aiding the opponent of his landlord, and openly colluding. It is not necessary to deliver the declaration in ejectment, before the bill is filed. It is sufficient, if a fair case for removing the obstruction is stated. This Plaintiff comes upon the established jurisdiction, stated by Lord *Redesdale* (44), to remove impediments to a fair trial of the question. Is a verdict, accidentally obtained, without going into the merits, to preclude for ever an examination of the Plaintiff's title? The action of ejectment is now considered to be the proper method of trying the title: but, if the object of the Plaintiff is to be defeated by such a casual circumstance, the ends of justice, for which that course has been adopted, will be wholly disappointed.

*Mr. Romilly, in Reply.*

This is a bill, not for discovery merely, but also seeking relief; and it is now fully settled, that the Plaintiff, not being entitled to the relief, cannot have the discovery; and a general demurrer is good (45). The doctrine of Lord *Redesdale*, that has been alluded to, has no application. Where it is admitted, that there is an outstanding term, that the legal estate is vested for a number of years in a certain individual; and, subject to that, all parties are equally entitled, the Court will not permit that term to be set up in a question between the parties as to the freehold. There was no objection to trying this question at law, when the ejectment was tried. The Plaintiff must therefore account for not trying it, when the legal obstacle did not exist. In *Mestaer v. Manning*, in which your Lordship was Counsel,

(44) *Mif.* 121.

(45) See the note, post, 553.

sel, a verdict having been obtained by the Plaintiff in an action upon a policy of insurance, the Defendants filed a bill; suggesting, that, if they had the discovery they then wanted, it would have produced a verdict in their favour. Lord *Thurlow* said, a party, desiring a discovery to assist him in establishing a right, or protecting himself against a claim at law, must come for that, before the trial at law takes place; and after that the Court will not assist him. The Plaintiff must state, that he has brought an ejectment. Then it would be known, who is to defend it; and against whom the relief is to be granted; which ought not to be prayed against three, upon the loose allegation, that one of them means to defend the action.

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*The Lord CHANCELLOR.*

I confess, I should with a good deal of regret find myself bound to relieve in such a case. Great inconvenience belongs to the particular circumstances: but, if relief would be given at the hearing, those considerations must not be set up against the principle. The bill does not stand precisely upon the principle, upon which in most cases a similar species of relief has been sought; which is, that those legal interests are in equity considered as to be used for the protection of those, having equitable rights: the principle of this bill being, that under the circumstances it is against conscience, that persons, who have no interest in equity, to be protected by this term in *Mills*, should set up that term against the right of the original landlord of *Mills*; who is considered in equity bound to protect the title of his landlord. I was too hasty in supposing, such a bill could not be filed, before an ejectment actually brought; for that is the mode of giving the relief, rather than a proceeding, actually brought before the bill; and by analogy

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logy to many cases it is not necessary to bring the ejectment, before the bill is filed. The most familiar case is that of an heir, claiming from an ancestor, or under an old settlement; who brings a bill, in fact for equitable relief; saying, there are terms, outstanding, that will defeat him at law; and desiring the Court to state, what is the legal right, if those terms are not set up; which terms in general are held for those, who have the legal interest in the inheritance. The course the Court takes, a course of convenience, rather than necessity, is, the Plaintiff asserting, that he has a legal right, if the term did not exist, to send it to law, where it will be most conveniently tried; preventing the Court of Law from knowing, that those terms do exist. But that is in truth equitable relief, modified. The principle of this case is different, viz.: that it is against conscience, that *Mills* should be allowed to set up in an ejectment, brought by his landlord, his lease; not to protect his own possession under his landlord; but for the purpose of actually evicting and excluding the landlord from his relation with him, as tenant; and that it is an unrighteous use of his lease to protect his title under those, to whom he has attorned, against his landlord. If that is true with respect to *Mills*, it is equally true as to *Mellish* and *Godfrey*; provided there is an attornment to them; for then this Court would not permit them to protect the tenancy of *Mills*, as a tenancy under them, by setting up the term; not asserting, that *Baker* has not title in ejectment; but asserting, that he had a title he could demise to *Mills*; and making use of that title to defeat the ejectment, brought by *Baker*; not to question that title; but disputing the title, under which *Mellish* and *Godfrey* became landlords to *Mills*: the principle therefore calling upon the Court to say, the relative situation of landlord and tenant shall not protect rights adverse to that situation. Upon that ground therefore, if this were a
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long term, the Court would interfere; and say, that in ejectment between such parties, in general cases, this term ought not to be set up.

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Then, supposing, the conduct of the tenant might at the election of the landlord be a disseisin, and an assize, a distress, or an action of covenant, might be maintained, still the principle applies farther than to prevent the lease coming in competition with these remedies; and extends to this; that they should not make use of the lease to narrow any of the Plaintiff's remedies, or to diminish their number; if ejectment is a more convenient remedy, and a remedy, to which he has a right to resort. As to the duration of the term, independent of other circumstances, it is difficult to say, that, if the principle of the Court is, that the question shall be tried upon the present right to the enjoyment and possession, it is to depend upon the circumstance, whether the term is long or short; and it cannot be stated, that the right exists, if the term is 10 or 20 years; not, if it is only two or three years. As to the phrase of the dignity of the Court, that has been referred to, the true sense of that is, that the Court will take care, that the administration of justice is not made a heavy oppression: where the interest is so small, that it would be only indulging vexation and passion to give the relief. Then does the conduct of the Plaintiff shut out his remedy? I have a strong inclination against him upon that. But, as a man may suffer judgment in ejectment to go against him by default; and try it again at a future period, if he finds it expedient, the question is, whether if he chooses to try it again, the title derived under him can be set up against him. Such a circumstance does not preclude him from insisting, that the tenant shall not first say, the relation between them is dissolved; and then set up the very instrument, upon which that

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that relation is founded. The fair principle is, that the Defendants have no right to make any use of the lease; even to raise the question; which if the term were longer, I should reserve till the hearing: but under the circumstances it will be convenient to decide it now.

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*The Lord* CHANCELLOR.

*March 26th.*

The only difference between these three cases is, that *Mills* is in the character of tenant; *Mellish* in the character of a person, now his landlord; and, as to *Godfrey*, the only question is, whether he is charged upon the bill to stand in any relation to the property in question. Upon the principles of this Court, if a tenant under a lease has, in consequence of such a circumstance as occurs here, a judgment in ejectment against him and the landlord, ceased to be his tenant, and has attorned as tenant to another, even if the landlord permitted that recovery in ejectment to be obtained by negligence, it is against conscience, that the tenant should upon any future trial of the right of that person, who stood in the relation of landlord to him, set up against that person, in order to defeat his right, the lease, taken from him; and, whatever other remedies the landlord may have, upon the principle, that has been very ably discussed, and however numerous they may be, yet this Court, pursuing that principle to its just extent, will not permit the tenant to defeat, or attempt to defeat, that right, if pursued by ejectment. If that can be maintained as to the tenant, the person, who becomes his landlord, is also bound in Equity not to take advantage of an act, which in Equity is considered unrighteous. Such a bill as this therefore might be maintained by a landlord, who lost his possession in ejectment; meaning to try another, against his former tenant; to restrain him from setting up the lease, taken from  
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the landlord, in order to defeat his title; and no third person would be permitted to take advantage of that act; if the tenant proposed to do it. The general equity of this bill therefore cannot be denied.

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v.  
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The next consideration is, whether the shortness of the term now remaining is sufficient to bar the equity. I think, it would be going a great deal too far to hold, that it will have that effect: especially, as I must now take the bill to be true; and if an answer is put in, admitting the truth of the fact, there is no reason, why the equity should not be administered in the course of a week. As to *Godfrey*, there is not a case made sufficient to bring him before the Court: the bill containing no averment, that he was in such a sense a party to the ejectment, that he even knew of the proceeding.

The rule of the Court is now settled, certainly contrary to the old practice, that a demurrer, if good to the relief, will do as to the discovery; if the discovery is sought for the purpose of the relief (46). When I first came into this Court, it was very common to hold, that a demurrer was good to the relief, and bad to the discovery. Afterwards Lord *Thurlow* held, that, if the discovery was sought, in order to obtain the relief prayed, a demurrer, that was good to the relief, was good as to the discovery also; and that I take to be the modern doctrine. This is a demurrer, going to the whole bill; as it is a bill for discovery, sought for the purpose of obtaining the relief thereby prayed. As to *Mills* and *Mellish* therefore the demurrer must be over-ruled (47); and allowed as to *Godfrey*.

(46) See the references in the notes, ante, Vol. II, 461; VI, 63, 606. VIII, 3. The rule is the same as to a Plea:

*Sutton v. The Earl of Scarborough*, ante, Vol. IX, 71.

(47) See *Baker v. Mellish*, post, Vol. XI, 68.



1805.

March 27th.

The necessary costs of an infant trustee, ordered to convey under the statute of Queen Anne, allowed.

Motion to commit the mother for not permitting the infant to convey not a proper mode of taking the opinion of the Court.

CANT, *Ex parte*.

UNDER an Order upon Petition within the Statute (48), for an infant trustee to convey, a question arose, whether the infant was entitled to the costs incurred. The point was brought on by a motion, that the mother of the infant should be committed, for not permitting him to convey; which the *Lord Chancellor* observed was an improper mode of taking the opinion of the Court upon a point of practice.

Mr. *Hall*, for the infant trustee, insisted upon a distinct undertaking of the party, presenting the petition, that all necessary costs should be paid.

The *Lord Chancellor* said, he did not recollect any Order, that an infant trustee should convey, directing the taxation of costs; but did not see upon principle, if necessary costs are incurred, that would be allowed in the case of an adult, why the infant should not have costs.

The Order was made, that the infant should convey: the other party undertaking to pay such costs as shall appear to be reasonably incurred; and it was referred to the Master to tax the costs: the *Lord Chancellor* intimating, that he hoped, the Master would look into the bill, with an anxiety not to allow any thing, that was not necessary: for instance, a brief to Counsel to consent for an infant; to which no attention could be paid.

(48) Statute 7 Ann, c. 19. c. 10, out of the lunatic's Costs of re-conveyance by estate: *Ex parte Richards*, Committee of a lunatic mortgage under Stat. 4 Geo. II, 1 Jac. & Walk. 264.

THE ATTORNEY-GENERAL v. OWEN.

1805.

March 8th,  
27th.

**I**N 1747 the trustees of a charity estate in the parish of *Aston*, near *Birmingham*, demised to *Benjamin Owen*, his executors, &c. a farm, with a dwelling-house and other buildings, &c. with an exception of the wood and underwood; to hold for 99 years, at the annual rent, during the term, of 32*l*. By a memorandum, indorsed upon the lease, the tenant agreed within seven years to lay out 40*l*. in rebuilding or repairing the buildings.

The information was filed in 1801, by the trustees at that time, against the personal representative of the lessee, who died in 1753; charging, that the premises were greatly underlet by collusion between the former trustees; that the trustees were guilty of a breach of trust under the circumstances; and stating applications to the Defendant, requesting him to surrender the lease, and offering to grant him a new lease upon fair terms; which was refused; and praying accordingly, that the Defendant may be directed to surrender the lease; offering to grant him a new lease for a reasonable term at a fair and proper rent; and that the Defendant may be decreed to pay an additional rent for the time past.

The Defendant by his answer admitted, that the lease was merely a husbandry lease; insisting, that the premises, both buildings and land, were in a very bad condition at the date of the lease; and required a considerable expenditure; and that with reference to those circumstances the rent was not too low. The Defendant also went into evidence of the money laid out in repairs and draining, to the amount of about 130*l*.

A lease for 99 years of a Charity estate, a farm, as a husbandry lease, cannot stand, without proof of a consideration, shewing, that it is fair and reasonable, and for the benefit of the Charity.

Under the circumstances, long possession permitted, and the Defendant being the personal representative, such a lease was set aside without costs, and without imposing an additional rent, previous to the bill; but future cases will not be so treated.

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The relators proved, that the farm is worth to be let at the present time at a rent of about 137*l.* a-year.


The claim of an additional rent was at the hearing confined to the period since the refusal by the Defendant upon request.

The *Attorney-General* and Mr. *Richards*, for the Information.

This Defendant must be directed to deliver up the lease; according to what your Lordship did in *The Attorney-General v. Green* (49): a lease for 99 years; much longer therefore than the proper duration of a husbandry lease; as this was: at a rent of 32*l.*; though proved of a value to be let at 137*l.* a-year; and only 40*l.* to be expended by the lessee. It is also necessary to make the Defendant pay the costs; on account of the number of small charities, under which the persons holding refuse payment to the trustees; upon the notion, that the Attorney-General will not file an information for so small a rent: the application of the trustees in this instance being as reasonable as could under the circumstances be expected. Have trustees for a charity a right to let the lands of the charity for so long a term? If this is allowed, where is it to stop? This mode of leasing is neither agreeable to the necessity of husbandry, nor the practice of land-owners. Though the term in *The Attorney-General v. Green* was much longer, the principle is the same; and was also acted upon in a case from *Wales*, upon a building lease, a very long term, granted to *Penoyer Watkins*; who was obliged to give it up: the term being considered a great deal too long for the purpose. In *The Attorney-General v. Green* your Lordship was struck with the circumstance, that  
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(49) Ante, Vol. VI, 452; see the note, 453.

the lessee was bound to lay out the sum of 500*l.* which made an account necessary; to bring home to him that sum and the interest; in respect of which he was a purchaser *bond fide*.

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Mr. *Romilly* and Mr. *Hall*, for the Defendant.

There is no decision, that applies to the circumstances of this case. In *The Attorney-General v. Green* (50) the ground was, that the interest given, a term of 999 years, was in truth the same as an estate of inheritance; and the effect of the transaction therefore a destruction of that, which the trustee was bound to preserve. The ground for impeaching this lease must be, that it appears upon the face of the transaction, that it was a breach of trust to grant such a lease; and, in that case certainly the party, having notice, cannot have the benefit of an interest, originating in a breach of trust. The difference between the rent reserved and the actual value ought not to have any weight. Upon a lease of so old a date evidence cannot be obtained of the state of the land, buildings, and other circumstances. As fraud and breach of trust are not to be presumed, it must be taken, that in reserving the rent the parties took into consideration the length of the lease. Since this lease was granted, a very extraordinary rise of rents, that could not be foreseen had taken place throughout the kingdom; and in the neighbourhood of this farm from accidental circumstances land has risen to nearly four times the former value. The great trade of *Birmingham* has arisen, since this lease was granted. If such a lease were granted at this time, and that town should fall into decay, and the value of estates in the neighbourhood should fall in proportion, it would be impossible for the lessee to get rid of the lease. Then the  
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(50) *Ante*, Vol. VI, 452.


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same reciprocity must prevail upon a contract with such trustees, as between individuals. If trustees cannot grant a lease for 99 years of a farm, what is the line? 60 years, 50, 40, 22? The act of the trustees in *The Attorney-General v. Green* (51) was quite inconsistent with the trust, and an annihilation of the subject of it. Unless that decree had been made, for 970 years there would not have been any trust estate: but these trustees will have this estate in forty years. As to the costs, this demand, that the Defendant should give up the lease, and accept the offer of another lease, at the best improved rent, such as would be granted to any other man, was not so clear, that he ought immediately to have complied with it.

The Attorney-General, in Reply.

This is a clear breach of trust. Nothing could produce consequences more mischievous, than to hold, that trustees have the power of granting such a lease: not for building; but a mere husbandry lease. The value of property has been rapidly rising long before the period, at which this lease was granted. There can be no difficulty in ascertaining the circumstances at that time. The answer states a great deal; representing, that the land had been allowed to go to decay; and required good husbandry; and this period is not out of the reach of living witnesses. As to the argument of reciprocity, and the instance put of an alteration in the value from accidental circumstances, it does not follow, that, as a person, guilty of a breach of trust, would be obliged to account, therefore, his plan failing, he has a right to be protected from the mischief, drawn upon him by his fraudulent contract. It is not necessary to fix the boundary. It is enough to say, it must fall far short

short of the case before the Court. Perhaps the line may be drawn by analogy to ecclesiastical leases: but your Lordship will not draw the line at the period of 100 years; and say, this is within it: nor will you be inclined to draw any line; but will say, in the particular case the conduct is so improper, that under the circumstances no advantage shall be derived from it. What difference is there in the market price between the inheritance, charged with the rent, and a lease for 99 years, so charged? There is only an imaginary difference, on account of the freehold interest. It is impossible to consider such a lease a due application of the charity estate.

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I am surprised to hear, there is no decision, declaring, that a lease for 99 years of a charity estate under such circumstances is a breach of trust; as I am certain, that for the last 25 years no doubt has been entertained upon it. The trustees of this charity, being entitled to a farm, consisting of a considerable quantity of land, five or six closes, and two meadows, with convenient buildings for the purpose of the enjoyment of the estate, as a farm, what was the previous rent not appearing, dealing as trustees of a charity, who are bound at least to as provident management as a provident owner, make this demise for 99 years at a rent of 32*l.* a-year. It appears by the indorsement, that there were buildings upon the premises; and from the nature of that indorsement their state was such as to be sufficient for the purpose of occupying the farm for seven years to come, without any expenditure; and therefore the engagement of the tenant was only to lay out 40*l.* in those seven years; which he might dole out as he pleased. It is admitted, therefore, that the state of the buildings was such, that all the consideration, which as a gross sum,

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sum, it was necessary for him to add to the rent, was that sum. It is said, it is quite competent to trustees to make a lease of this kind for 99 years; and it is truly said, a lease for 99 years, at a rent of 32l., with an expenditure of 40l., may be a reasonable transaction: but it will be reasonable in very few instances; and the Court, looking at a transaction, that aims at the alienation of a charity estate for 99 years, will put it upon those, who were dealing for and with the charity estate, to shew, that it is reasonable; for ordinarily it is not a reasonable transaction. There is no instance of a power in a marriage settlement to lease for 99 years, except with reference to very particular circumstances. The ordinary husbandry lease is for 21 years. Building leases are sometimes made under a settlement for 60 or 90 years; but not for the same rent during the whole time. There is no rent for the two or three first years, until the buildings are covered; and then they are at a rent, generally not increasing to the end of the lease, but increasing. Upon a devise to A. in fee in trust for his infant son, to be conveyed to him at the age of 21, and without imposing terms upon the trustee as to the rent, the length, or terms, of the lease, this Court would say, the trustee was to do what was reasonable; and it would be monstrous to hold, that he could alienate the land for 99 years at a stationary rent. The Court would put it both upon the trustee, and the lessee, taking under him, to shew, that the act was reasonable; and done in the fair management of the estate. There is no case, in which calculators ever give the same evidence: but I do not recollect an instance of difference, that would displace the observation of the *Attorney General*, that they make very little distinction between an interest for 99 years and the inheritance; both paying the same rent. Suppose, they were asked, after this lease had been granted, what they could

could get for the inheritance. The case of *The Attorney-General v. Green* (52) was open to almost all the considerations as to reciprocity, that have been stated in this argument. The true point is this; and I will not state it any other way; for my predecessors thought it too dangerous; and I think it right to follow them in that: I will not lay down any precise rule: but I am clearly and decidedly of opinion, that an alienation for 99 years of a charity estate, if a mere husbandry lease, and without consideration, to be shewn by those, who make, and take, the lease, to point out, that it is a proper bargain, with reference to a husbandlike manner of acting, is a lease, which this Court will not permit to stand.

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As to the costs, that is to be governed by the conduct intended on both sides; and must be considered upon the offer of the *Attorney-General*, which becomes him, to give a reasonable lease; having regard to the expenditure of the lessee, and the advantage, derived by him; and recollecting, how long the trustees permitted this; and, that this Defendant is the personal representative; and considering what ought to be done with reference to any ulterior rent. As to the costs therefore let the cause stand over to the first day of the Term; and treat in the mean time. Upon the other point I have no doubt whatsoever, that such a lease of a charity estate shall not be permitted; unless it is shewn to be fair and reasonable, and for the benefit of the charity.

The Lord CHANCELLOR.

I continue of the opinion, that the lease ought to be delivered up. Then the only consideration is, whether

March 27th.

(52) Ante, Vol. VI, 452.

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ther the Defendant ought to be charged with any rent beyond the 32l. a-year; and I think not, for any period prior to the filing of the bill. As to the costs, if he gives up the lease without any trouble, I will not make him pay the costs. But this case is not to be considered as an authority, with reference to persons, taking such leases of charity estates; and in future they will not get off so easily.

The Defendant undertaking to give up the lease immediately, the Decree was made accordingly, without costs; and it was agreed, that he should continue in possession to the end of the year; paying a rent.

At the
 ROLLS,
 1803.
 Dec. 23d.
 Before the
 Lord
 Chancellor,
 Upon Appeal,
 1805,
 March 11th,
 28th.
 May 2d.
 Construction
 of a Will, con-
 fining a clause
 of survivor-
 ship, not leav-
 ing issue, to the death of the tenant for life.

JENOUR v. JENOUR.

MATTHEW JENOUR by his Will, dated the 2d of August, 1783, made the following disposition:

“ First, I leave in trust to my sister *Margaret Jenour*,
 “ my brother *Thomas Jenour*, and my nephew *Joshua*
 “ *Jenour*, 600l. *per annum*, of my Bank Long Annuities;
 “ of which my sister *Margaret Jenour* shall have 400l.
 “ *per annum* during her life; and my brother shall
 “ have 200l. *per annum* during his life. 2dly, Upon the
 “ decease

Where a question arises upon the interest in a trust fund, separated from the general residue, the costs must come out of the particular fund; and having been given by the Decree, as specifically prayed by the Bill, out of the general personal estate, the Decree, though affirmed in other respects, was corrected in that particular; being considered as relief prayed; and therefore not within the rule against appealing for costs only.

"decease of either of my trustees another shall be
 "chosen by my two surviving trustees and three nieces
 "or the majority of them; and my two surviving
 "trustees shall transfer the said annuities into the
 "names of themselves and the trustees, so to be
 "chosen; and upon the death of every trustee the
 "like choice of another and transfer of the annuities
 "shall be made during the term of the said annuities.
 "Upon the decease of my sister 200*l. per annum* of
 "the annuities, left to her during her life, shall be
 "equally divided between my two nephews *Joshua* and
 "*Matthew Jenour*, and three nieces, *Charlotte Jenour*,
 "*Sidney Finch*, and *Jane Jenour*, and the survivors of
 "them; and the other 200*l. per annum* shall be my
 "brother's during his life, if he shall survive my sister;
 "and after his decease shall be equally divided between
 "my two nephews *Joskua* and *Matthew Jenour*, and
 "go to the survivor of them in case his brother shall
 "leave no lawful issue: if he shall, such issue shall be
 "in place of their father with regard to the said an-
 "nuities. Upon the decease of my brother the 200*l.*
 "*per annum* of the annuities left to him during his life
 "shall be equally divided between my two nephews
 "and three nieces before named and the survivors of
 "them; and my nieces and the husbands of such as
 "shall be married shall assign to my nephew *Joshua*
 "*Jenour* all right and claim to any part of the share
 "of the *Daily Advertiser* left to them by the Will of
 "their father; and my trustees shall not pay to them
 "their share of this legacy till such assignment shall
 "be made. No part of the above-mentioned 400*l.*
 "*per annum* Bank Long Annuities left to my two ne-
 "phews and three nieces before named after the decease
 "of my sister and brother shall be subject to the con-
 "troul or disposal or liable to the debt or debts of any
 "husband, that either of my nieces shall have: but
 N N 2 " the

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“ the share of each niece shall be paid to such niece  
 “ only; and her receipt alone shall be a legal dis-  
 “ charge to my trustees for the same. This legacy  
 “ to my nieces I give upon this express condition,  
 “ that neither of them under any pretence whatever  
 “ shall consent to alienate or part with the whole, or  
 “ any part of her share of the said 400*l.* *per annum*;  
 “ and if at any time it shall come to the knowledge of  
 “ my trustees, that either of my nieces have broken  
 “ this condition, upon the punctual observance of  
 “ which alone they shall have a legal claim to any  
 “ share of this legacy, from such time my trustees  
 “ shall divide the forfeited share of such niece equally  
 “ between her surviving sisters and brothers during the  
 “ life of such niece: but, if she shall leave lawful  
 “ issue at her death, such issue from that time shall  
 “ have their mother’s share of the said 400*l.* *per annum*  
 “ in the same manner, as they would have had it, had  
 “ not their mother forfeited the same during her life;  
 “ for the lawful issue of my nephews or nieces shall  
 “ be in place of their father or mother after their de-  
 “ cease; and have their father or mother’s share of  
 “ the said annuities: Thirdly, my lease of the office  
 “ or place of one of the 15 Coal Meters of *London* I  
 “ leave in trust to my nephew *Joshua Jenour*, whom  
 “ I would have to take upon himself the said office;  
 “ and from the income of the same shall pay to each  
 “ of his two unmarried sisters, *Charlotte* and *Jane*  
 “ *Jenour*, whilst they remain unmarried, 30*l.* *per an-*  
 “ *num*, during the life of my sister *Margaret Jenour*,  
 “ and 16*l.* *per annum*, during the life of my brother;  
 “ also from the income of the same shall lay out 350*l.*  
 “ *per annum* in the purchase of Bank Long Annuities,  
 “ together with the produce of such Annuities, until  
 “ 92*l.* *per annum* Bank Long Annuities shall have been  
 “ purchased; which Annuities shall be put in the  
 “ names


“ names of my three trustees; and shall be reserved to  
 “ pay to each of my said two nieces the 30*l. per annum*,  
 “ during the life of my sister, and 16*l. per annum* during  
 “ the life of my brother, if my sister and brother shall  
 “ survive the expiration of my coal-meter’s lease: the  
 “ surplus and remainder of the income of my coal-meter’s  
 “ place after making the aforesaid provisions I give to  
 “ my nephew *Joshua Jenour*: after the decease of my  
 “ sister and brother, the 92*l. per annum* Bank Long  
 “ Annuities, directed to be purchased, shall be an-  
 “ nexed to the 200*l. per annum*, given to my two  
 “ nephews in the second article of my Will, and go to  
 “ them in the same manner.”

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After giving some other legacies, the testator appointed his brother *Thomas*, and his nephew *Joshua Jenour*, his executors; and appointed the latter his residuary legatee. The testator also made the following disposition, by two codicils:

“ £120 *per annum* Bank Annuities 1778 for thirty
 “ years I leave to my brother and sister *Margaret*
 “ *Jenour* and the survivor of them during life; and, if
 “ neither of them shall live to the expiration of the said
 “ annuities, after their decease these annuities shall
 “ be equally divided between my two nephews, *Joshua*
 “ and *Matthew Jenour*; and go to the survivor of them,
 “ if his brother shall leave no lawful issue, 13th August,
 “ 1784.”

Second codicil.—“ I leave to the trustees, men-
 “ tioned in my Will, 30*l. per annum* of my Bank Long
 “ Annuities, to apply towards the education and sup-
 “ port of *Mary Ann Williams*, daughter of my late
 “ niece, until she shall attain the age of thirty years,
 “ when the said annuities shall be transferred to her,
 “ and

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“ and be at her own disposal, but, if she shall not live to
 “ that period, these annuities shall be equally divided
 “ between my two nephews, *Joshua* and *Matthew Jenour*,
 “ and go to the survivor, if his brother shall not leave
 “ lawful issue.”

The testator died in 1785. The 92*l.* Long Annuities were purchased according to the directions of the Will; and invested in the name of trustees. *Margaret Jenour* died; leaving *Thomas Jenour* surviving; and he died in *February* 1803. The bill was filed by *Matthew Jenour*, the testator's nephew; praying a declaration, that the Plaintiff is become entitled to an equal moiety of the principal of the 92*l.* Bank Long Annuities, absolutely; and a transfer accordingly; and that the Defendant *Joshua Jenour* may be decreed to pay the Plaintiff his costs of this suit out of the clear residue of the testator's personal estate in his hands, as executor.

The Defendant, *Joshua Jenour*, by his answer submitted, that upon the death of *Thomas Jenour* the Plaintiff did not become entitled to an absolute interest in the moiety of the 92*l.* *per annum* Bank Long Annuities; but became entitled to an interest for his life only.

1803.
 Dec. 23*d.*

The MASTER of the ROLLS (53).

I am always indisposed to the construction of indefinite survivorship. In many of the cases the argument might have been used, that you are inserting words. Here much time might elapse, before any part of these annuities would come to the survivor. He provides for the case of survivorship. If the period of survivorship is fixed, the leaving issue must mean leaving issue then, at the time of the death of the tenant for life.
 His

(53) The Judgment at the Rolls *ex relatione*.

His expressions first are adapted to the case of death before the tenant for life; for the children are to stand in the place of the father: that is, to take the same quantity of interest as the father would have taken, if he had been then living: that is, the father shall take absolutely, if living at the death of the tenant for life: if then dead, leaving issue, then the issue is to be entitled in the place of their father, *i. e.* shall take absolutely; and the living nephew also shall take absolutely. That is an equal gift: but the other construction would not be so. There is always considerable difficulty in fixing the precise period of survivorship, when the testator has not in so many words expressed it. It is always attended with a degree of uncertainty: but this is the best construction I can put upon it.

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The decree directed, that the Defendants should transfer one moiety of the 92*l.* *per annum*, Bank Long Annuities, to the Plaintiff, and pay to him a moiety of the dividends, accrued in respect thereof, since the death of *Thomas Jenour*; and that the other moiety should be transferred and paid in the same manner to the Defendant *Joshua Jenour*; and the costs of all parties were directed to be paid out of the general personal estate of the testator.

From this decree the Defendant *Joshua Jenour* appealed to the Lord CHANCELLOR; insisting, that the petitioner and the Plaintiff ought to have been declared entitled to the 92*l.* *per annum* Long Annuities during their respective lives only, with benefit of survivorship to them and their issue, according to the Will; also, that the costs of the suit, ought to have been directed to be paid out of the said 92*l.* *per annum*, and not out of the general personal estate of the testator.

The

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The *Attorney General*, Mr. *Piggott*, and Mr. *Hart*, for the Defendant, in support of the appeal, contended for the construction, extending the benefit of survivorship between the nephews to the death of one at any time, leaving no lawful issue; not confining that event to the death of the brother, entitled for his life; two circumstances constituting the previous condition: survivorship, and the non-existence of children of the deceased nephew: this construction being the ordinary meaning of the words, as they stand: that, adopted by the decree, requiring words to be supplied.

Mr. *Alexander*, Mr. *Romilly*, and Mr. *R. Smith*, for the Plaintiff, in support of the decree, insisted, that, to avoid tying up the property, the inclination of the Court is to limit the survivorship; observing, that the bequest in favour of the issue is confined to the issue of the nephew dying first; not extending to the issue of the survivor; and the construction of the clause, expressly putting the former children in the place of their father, must be limited to the event of the father's death in the life of the tenant for life, the period pointed to in all the other dispositions,

The Lord CHANCELLOR.

March 28th.

The effect of this decree is, that the Plaintiff is absolutely entitled to a moiety of the 92l. Bank Long Annuities; though the ordering part is not prefaced by a declaration of the rights, according to the prayer of the bill; which would have been more regular. Two questions arise upon the appeal: 1st, Whether upon the true construction of the Will the Plaintiff became so entitled: 2dly, Whether the point as to the costs of this suit is well decided by the direction, that the executor shall pay the costs out of the personal estate of the testator. As this suit is framed, the point is selected

lected with reference to the fund of 92*l. per annum* Long Annuities; the decision upon which may go to intimate an opinion, not to decide, as to the title to the 200*l. per annum* Long Annuities; to which by the Will the other fund is annexed. . In the discussion as to that fund many questions are involved, as to the construction in events, that might have happened; and this Will is doubtful in such a degree, that I have in the course of the argument changed my opinion several times. It is clear, the testator had not the least conception of the legal effect of the words he used; and the construction to be made upon this Will probably will in a great degree defeat his actual intention as to the disposition of his property.

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v.
JENOUR.

If the first part of the disposition, giving 200*l.* Annuities, of the 400*l.* Annuities, which the testator's sister was to have for her life, to his nephews and nieces and the survivors of them, had stopped there, the necessary construction would be a distribution among those, who upon the decease of his sister were living; and the legal interpretation would not create a benefit of survivorship among them: but under the words "equally divided," they would take the absolute interest, as tenants in common; and then it would be too great a strain to hold, that something more was intended by the additional words "go to" in the disposition, immediately following, of the other 200*l.* Annuities. As to that, if one of the nephews died in the life of the testator's brother, leaving issue, according to the express phrase that issue would be in the place of their father; and take a moiety of that fund of 200*l.* Long Annuities. It is also clear, that, if that issue died in the life of the testator's brother, so that at his death there was no person living, representing that deceased nephew, yet the survivor of the two nephews would not have taken that moiety, but it would have vested in the issue. But, if both nephews had died, and left issue, the

Tenancy in
common under
the words
"equally di-
vided."


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the effect is, that the issue of the nephew, who died first, would have stood in the place of the father; but not the issue of the nephew, who died last; though that issue would have taken his moiety as his personal representative. The testator has therefore applied a direction, having all these singular effects as to the 200*l.* Annuities. Upon the next clause, as to the 200*l.* Annuities, left to the testator's brother for life, if it stopped at the direction for an equal division between the nephews and nieces, and the survivors, that would have been absolute to such nephews and nieces, as were living at the death of the brother. But a clause follows, as to the nieces; supposing them in certain events to forfeit their right to the enjoyment for life of their shares; and giving the forfeited shares during the respective lives among those, who had not forfeited; but stating, that the issue after the death of the mother shall have her share of the 400*l.* *per annum*, in the same manner as they would have had it, had not their mother forfeited the same during her life; for the issue of his nephews and nieces shall be in place of their father or mother after their decease; and have their father or mother's share of the said annuities; not stating, what shall become of it, if they do not leave issue. If this is to be construed with reference to the 400*l.* only, upon the necessary effect of the words in the conclusion of that clause it is impossible to contend, that either the fathers or the mothers have an absolute interest in the shares of that fund, if they leave issue; for the issue would stand in the place of the parents respectively; and there are not words enough to justify the construction, that they would have the absolute interest, subject only to be divested in the event of death, leaving issue. As to the proportion of that fund the construction must be, that those nephews and nieces, who should be alive at the death of the testator's brother, should take; but not absolutely, if there should be children: the children

dren taking their shares; and also, if some of the nephews and nieces died in the life of the brother, - but leaving children; they would have had a right to stand in the place of the father or mother, though not surviving the brother. There is a question upon the whole, whether even as to the 400*l.* that bounty, which the testator intended for his nephews and nieces, was meant to be given to the survivor, if they afterwards died without that issue, to whom he intended bounty. It is not necessary to give an opinion upon that: But the ulterior question is, whether the testator shall be understood to say, not only as to the 400*l.*, but also as to the 200*l.*, that, if either died, leaving issue, the issue should take; but, if either died without issue, that one, who had issue, should take. Upon the whole, the construction must be, that one nephew shall take the whole, if one only be living; except the one deceased has left issue: in that case the one surviving shall take half; and the child or children of the deceased the other half. Thinking this as doubtful a case as I ever had to decide, I am not authorised to put a different construction upon the bequest of the 200*l.* Annuities, as that stands in its proper place, by applying to it the declaration, that is found at the end of the clause as to the 400*l.* Annuities. Whatever, therefore, might have been the claim of the issue, this Plaintiff, having survived the testator's brother and sister, is entitled to one moiety of the 92*l. per annum*; and there are not words enough to maintain the other construction.

As to the costs, there is a distinction between this and the ordinary case of costs out of the estate; for, though it is true, that rule prevails, where a question arises between the individual and the person taking the bulk of the estate, how far the bulk of the estate is * to answer for a legacy, a sum of money, or a portion; yet, if there is no question between the latter and persons, claiming against him the bulk of the estate; but, after

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No revivor for costs alone; unless to be paid out of the estate.

after he has paid out of the bulk, and done all, that is incumbent upon him, a question arises as to the interest in that property, clearly severed from the bulk, the expence of questions, touching that fund, ought to be thrown upon the fund itself. I doubt also, whether this can be said in a strict sense to be an appeal for costs only (54). This is the first case, in which the question, how the costs are to be paid, has appeared upon the record. You cannot revive for costs alone (55); but if costs are to be paid out of an estate, you may revive for them (56).

Mr. Romilly stated, that he conceived the rule to be, that, where the costs are in the discretion of the Court, there can be no appeal upon the subject of costs. In *Wirdman v. Kent* (57), according to a MS. note, Lord Thurlow made a variation in the decree, as to a compensation; and yet refused any variation as to the costs: the variation being such as would have been made, when the cause came on for farther directions, if desired. In *Williams v. Beynon* (58), upon a rehearing the *Gravamina* were, that the Defendant ought to have been charged with the interest and costs. The opinion of the Court was, that the costs ought to have been given originally, but not the interest; and the decree was affirmed; on the ground, that there could not be a rehearing for costs only; which was the only subject,

(54) *Taylor v. Popham*, post, Vol. XV, 72. *Ex parte Baines*, 1 Glyn & Jam. 259. *Beames on Costs*, 191.

(55) Ante, *Morgan v. Scudamore*, Vol. II, 313. III, 195. See the note, II, 317.

(56) So, where the costs have been taxed before the

abatement. See 2 Mer. 116.

(57) 2 Bro. C. C. 140, stated from Mr. Romilly's note.

(58) In the Court of Exchequer, cited from a note of Lord Colchester. *Beames on Costs*, 300. See also 189, 191.

ject, upon which the decree could be impeached; though the claim of interest was not considered frivolous. There is a note in the printed Report, pointing at the distinction, taken by your Lordship, where the costs are ordered to be paid by the party, and were out of the estate.

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The Lord CHANCELLOR.

Suppose, a third person was executor, and brought before the Court. Here the executor happens to be before the Court by the mere accident, that the trustee happens to be executor; for, as executor, he had done with the fund; having placed it in the hands of the trustees for the persons, entitled under the trust. It has been 17 years out of his hands, as executor. Then this is, not costs within the common rule, but relief. I will give the declaration myself; that it may not be misunderstood.

The following Declaration was afterwards given out by the *Lord Chancellor*:

May 2d.

“ Inasmuch as the fund, the right to which was in
“ question in this cause, had been separated from the
“ residue of the personal estate of the testator, and
“ placed in the hands of the trustees thereof by the exe-
“ cutor, before the bill filed, and as the payment of
“ the costs of this suit out of the residue, is in this
“ cause specifically prayed by the bill as relief, and
“ the executor, as such, is made a party to the suit,
“ in respect of that relief, so prayed; the order for the
“ payment of the costs in the decree complained of is
“ in this particular case to be considered as relief
“ granted by the Court; and in this case the resi-
“ due of the personal estate ought not to have been
“ charged

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“ charged with the payment of the costs of this suit;
 “ but the same ought to be paid out of the trust-
 “ fund, the right to which was in question in this
 “ cause; and, therefore refer it to the Master to tax
 “ the costs of this suit; and let so much of the fund
 “ in Court as will be sufficient to raise what shall be
 “ taxed for the costs be sold; and let the same be paid
 “ to the several Solicitors; and with this variation af-
 “ firm the Decree.”

ROLLS.

1805.

Feb. 14th.

March 29th.

CARR v. TAYLOR.

Settlement by husband in consideration of the portion or fortune, which he would have or receive upon his marriage, limited to the portion received upon the marriage; not extending to make him a purchaser of future accessions; unless that intention is clear.

The wife, therefore en-

titled to an additional provision out of a subsequent interest, arising to her, as next of kin; which equity was administered upon her Bill against the assignees under the bankruptcy of her husband; and the administrator cannot set off a debt from the husband to the Intestate's estate.

THE bill was filed by *Maria Carr*, claiming, as sister, and one of the next of kin, of *William Taylor*, a share of the residue of his personal estate, under the Statute of Distributions. He died on the 16th of April, 1802. In December 1802 a Commission of Bankruptcy issued against *George Carr*, the Plaintiff's husband. By the settlement, previous to their marriage, dated the 11th of November, 1791, expressed to be in consideration of the portion or fortune, which *George Carr* would have or receive upon his marriage with *Maria Taylor*, and for making some provision for the said *Maria Taylor* and the issue of the marriage, *George Carr* covenanted with *William Taylor* and *John Fish*, that he *George Carr*, his heirs, executors, &c. would pay to them, or the survivor, &c. the sum of 1500*l.*, to be invested in real or Government securities; and that they should stand possessed thereof, upon trust to pay the interest and dividends to *George Carr*, and his as-

signs,

signs, or permit him and them to receive the same for his life; and after his decease upon trust for *Maria Taylor* for her life, in the same manner; and after the decease of the survivor of them upon trust to pay and transfer the capital among the children, subject to the appointment of *George Carr*, by Deed or Will; and, in default of children, to *Maria Taylor*, her executors, &c.

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CARR
v.
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The trustees not having called upon *George Carr* to pay the 1500*l.*, it was proved as a debt under the Commission; and a dividend, to the amount of 112*l.* 10*s.* was received by the surviving trustee. The bill prayed that the share of the Plaintiff in the residue of *William Taylor's* personal estate may be secured for the benefit of the Plaintiff during her life, and her children after her death.

The widow and administratrix of *William Taylor* by her answer stated, that part of the personal estate of the intestate consisted of the sum of 400*l.*, due to him from *George Carr*, and secured by the joint and several promisory note of him and his father, dated the 6th of *May*, 1797, and payable on demand; and claimed a lien in respect of that note upon the share of the Plaintiff, or her husband in her right, may be entitled to. The assignees under the Commission claimed the share of the intestate's estate, to which the bankrupt became entitled in right of his wife, on the ground of the settlement, and the proof made, and the dividend received in respect of it, under the Commission.

Mr. Thomson and *Mr. Bolland*, for the Plaintiff.

There are two questions: first, whether this share of the intestate's personal estate is the property of the

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the Plaintiff, or of the assignees under the bankruptcy: 2dly, Whether it is subject to the debt, due from the bankrupt to the intestate. Both these questions are settled in *Lady Elibank v. Montolieu* (59), in favour of the wife: the only doubt the *Lord Chancellor* had being, whether she could institute the suit: but he came finally to the opinion, that she could. In that case, as in this, there was a settlement by the husband previous to the marriage: which did not prevail against the claim of the wife. The settlement in this instance, as in that, is in consideration of the fortune of the wife, generally; not pointing to any future accession. The husband therefore did not become entitled to all her future interest. It is now settled, that the wife is at least entitled to a provision out of property under such circumstances.

Mr. *Martin*, for the Defendant, the Administratrix.

The only equity, under which this relief is sought, is, that the Plaintiff's husband has become a bankrupt. The distributive share of this intestate's estate might be obtained without the assistance of this Court. The debtor could not have filed a bill, suggesting the equity of the wife. In *Oswell v. Probert* (60) the fund was actually in Court: therefore it was necessary that the Court should act; and, the fund being in Court, it was considered the same as, where the husband comes here. With that exception the cases only go this length; that, where persons, claiming under the husband come here, seeking the assistance of this Court, to obtain the property of the wife, they shall not have it without making a provision for her. In *Lumb v. Milnes* (61) the assignees, representing the husband, were the actors.

Upon

(59) Ante, Vol. V, 737.

See *Burdon v. Dean*, 607,

(60) Ante, Vol. II, 680.

and the note, 609.

(61) Ante, Vol. V, 517.

Upon the question of set-off, if the wife is not entitled to file this bill, the assignees are in no better situation than the husband; and as against him the personal representative might have said, his debt constituted part of the estate; and, as between them she was not bound to pay the whole, claiming the debt against him; but was entitled to set-off the debt. In *Lady Elibank v. Montolieu* there was no bankruptcy: nothing to divest the legal rights.

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v.  
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Mr. Romilly and Mr. Wetherell, for the Assignees.

It is true, that formerly a married woman was not at liberty to file such a bill: for the principle was, that the Court would not give assistance to those, who sought to obtain her property, without making a provision for her. If *Lady Elibank v. Montolieu* (62), and *Mealis v. Mealis* (63), in which case this Court restrained the husband from proceeding in the Ecclesiastical Court to recover a legacy in right of his wife, are to be considered as having established the right, certainly the doctrine is modern.

Upon the other question, though there is a settlement upon the wife, if that is not intended to be a satisfaction for every thing, so that her husband is to be a purchaser of all, that may come to her, she is entitled to a settlement out of any future accession of property. But the construction of this settlement, not stating any particular portion, or fortune, must be, that it is in consideration of the marriage, and the rights the husband will acquire: the marital right to all her property. There is nothing to restrain the prospective, as well as retrospective, application of the words.

Mr.;

(62) Ante, Vol. V, 737.

(63) Ante, Vol. V, 517, n.



1895.

CARR

v.

TAYLOR.

Mr. Thomson, in Reply. •

Whatever doubt may formerly have prevailed, the case of *Lady Elbank v. Montolieu* has now settled, that a married woman may assert this equity either as Plaintiff or Defendant. Every argument, that is now urged, was pressed in that case; which cannot be distinguished. The distinction, whether the property is in Court, or in the hands of the administrator, was considered as of no importance. That case is equally decisive upon the other point, that the debt of the husband cannot be set off. If an action were brought for this interest of the wife, she must be a party to that action: but she could not be a party to the action for the personal debt of the husband. The ground of action is different; and does not admit a set-off. In *Buller* (64) it is laid down, that a debt, due to a man in right of his wife, cannot be set off in an action against him upon his own bond.

The MASTER of the ROLLS.

Suppose, the husband sues in right of his wife upon a bond, given to her, when sole: might not a debt due by the husband be set off against that?

Reply.

There could not be a set-off in that case. The debts are in different rights: in the one the wife is a necessary party: not in the other.

The MASTER of the ROLLS.

There has been, I think, some doubt upon that at Law. This case differs from that cited: 1st, as to the question of set-off: next, as to the import of the consideration: *i.e.* whether the settlement was in consideration of every thing, to which the wife might be entitled, or what

what she then had. If it was in consideration of all her fortune, which she then had, or might be entitled to, then the husband was a purchaser of the whole by the settlement, made upon the marriage; and the wife could not claim any thing afterwards. The construction may be, either, the fortune he will actually receive at the moment of the marriage, or, the rights he will acquire by the marriage.

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CARR  
v.  
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*The MASTER of the ROLLS.*

The doubt in this case is, whether the husband ought to be considered a purchaser of the whole fortune of his wife, or only of that, which he was actually to receive with her at the marriage. If he was a purchaser of the whole, she is not entitled to any provision out of what has since accrued: if he was not a purchaser of the whole, she will by the rule of this Court be entitled to an additional provision out of that additional fortune. The rule is established, that, to make the husband a purchaser of the whole, the settlement must either express, or clearly import, that intention (65). This settlement does not express that intention, or clearly import it; and the meaning seems to be, that the husband should take only what was to become his immediately upon the marriage. It is not alleged, that the provision he made for her was more than adequate to that fortune.

March 29th.

With regard to the claim of set-off, made by the administratrix of *Taylor*, upon the ground, that the Plaintiff's husband was indebted to the estate of the intestate, whatever controversy there might have been

As to the  
upon right of the  
husband to  
sue in his own  
name for the

(65) *Mitford v. Mitford*, ante, Vol. IX, 87.

legal chose in action of his wife, *Qu.*

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upon the right of the husband to sue in his own name for the legal *choses in action* of his wife, he could not sue for this fund without joining her; and, if he had obtained a decree for it in her right, and died, before he had reduced it into possession, it would have survived. This is a case therefore, in which there can be no set-off for the debt of the husband (66).

Decree an account, to ascertain the Plaintiff's share; and the assignees must make a proposal for an adequate settlement out of that share, having regard to the settlement already made upon her.

(66) See *Ranking v. Barnard*, 5 Madd. 32. *Ex parte O'Ferrall*, 1 Glyn & Jam. 347.

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 March 27th,
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RICHARDS v. CHAMBERS.

SEAMAN v. DUILL.


No jurisdiction in equity by the consent of a married woman upon examination to transfer to her husband personal property, settled in trust for her, surviving her husband, absolutely.

IN these two cases the general question stood for judgment, as to the jurisdiction of this Court with the consent of a married woman upon examination to direct a transfer to her husband of personal property, settled in trust for the wife, absolutely, if she should survive her husband.

The MASTER of the ROLLS.

In these two causes I am called upon to determine the important and much agitated question, whether it is competent to a married woman by examination in this Court to relinquish the provision, secured by her marriage settlement, and to transfer to her husband that property, to which he cannot make any claim, and over which she has not reserved any power of disposition. In the first of these cases property is settled in trust for the sole and separate use of the wife for life; and, if she survives


survives her husband, it is to be absolutely her's: if she dies in his life, it is to go to such persons as she by Deed or Will shall appoint; and, in default of appointment, to her executors and administrators. There is a part of the property in Court in trust in this cause. The husband and wife apply by petition to have it transferred to them. She has executed an appointment in his favour; and, having been examined *de bene esse*, has expressed her consent and desire, that the prayer of the Petition should be complied with.

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In the second case the property is settled to the husband for life: if he survives his wife, to him absolutely: if she survives, to her absolutely. They file the bill; desiring, that the whole shall be paid to the husband.

In the first case the wife, having a separate estate for life, might according to the doctrine of many cases part with that life interest (67). She might also execute an appointment in favour of her husband, or of any person; which appointment in the event of her death in his life would be a valid and effectual disposition of the property. But the question in both cases is, whether the contingent interest, which the wife, while *sui juris*, has secured to herself in the event of her surviving her husband, can through the interposition of this Court be given up by her, while in a state of coverture. First, I will examine the authorities; for, if the established doctrine of the Court is, that this may be done, I shall not think it necessary, or proper, to examine the soundness of the principle, upon which that doctrine was first introduced. But, if the authorities leave it in doubt, then we may inquire into the principle, upon which the Court

(67) *Chesslyn v. Smith*, ante, *Trimby*, 2 Jac. & Walk. Vol. VIII, 183. *Gullan v.* 451, n.

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Court can exercise such a jurisdiction, as is supposed by those, who support this claim. In examining the cases I purposely abstain from those, that relate either to the separate property, which in equity she may have (68); or property, over which she has reserved, or had given to her by the settlement, a power of appointment; or, which the husband has an absolute or unqualified right to reduce into possession. None of those cases can have any direct application to this question. I had supposed, that all the cases, which do apply to it, were of modern date: but I have found two cases in the time of Lord *Nottingham*, to which it is proper to advert; though from the reports, in which they are found, and the position they affirm, they are not entitled to any great attention. Those cases are *Brudnell v. Price* (69), and *Paget v. Paget* (70). In each of them Lord *Nottingham* is represented to have directed part of the property, settled, or agreed to be settled, upon the wife and children, to be laid out in the purchase of an office for the husband upon the consent of the wife. The proposition, that the interest of the children could be affected by her consent, could not be decided or contended. Of *Paget v. Paget* no mention is made in Lord *Nottingham's* MS. notes, in the possession of Mr. *Hargrave*: *Brudnell v. Price* is mentioned; but in a way quite different from that represented by the Report. According to the MSS. she merely consented, that part of her unsettled property should be paid to her husband.

Until the case of *Sperling v. Rockfort* (71) I was not aware, that any question of this sort had been before Lord *Hardwicke*. But the case of *O'Keate v. Calthorpe*, there (72) referred to by the *Lord Chancellor*, bears directly

(68) Post, *Witts v. Dawkins*,
 Vol. XII, 501. *Sturgis v.*
Corp, XIII, 190. See the
 note, ante, V, 17.


(69) *Finch*, 365.

(70) 2 *Ch. Ca.* 101.

(71) Ante, Vol. VIII, 164;
 see the notes.

(72) Ante, Vol. VIII, 177.

rectly upon the point before the Court. The settlement * in that case is precisely that in this case of *Richards v. Chambers*. The case of *Ducket v. Neagle* (73) does not appear in the Register's Book. It is in the Minute Book: but from that it is impossible to collect the circumstances; expressing only, that it was prayed by the bill, that the Defendant, the surviving trustee, might pay the husband 470*l.*, "being the residue of the wife's fortune." The husband agrees to give the trustee a bond to pay him 500*l.*, in case the wife should survive. She is examined; and consents upon those terms to the payment; and the Court directs it. In *O'Keate v. Calthorpe* the Lord Chancellor says, there was no ground to break in upon the marriage agreement, and take away the interest: if she had any power over the principal, let her make an appointment; and he would consider the effect of it; but would not interpose upon her coming into Court.

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 [*583]:

This case seems to shew, that Lord *Hardwicke* did not conceive, the Court had any such jurisdiction as is attributed to it. He says, "if she has any power, let her exercise it; but the Court cannot give it." In *Fraser v. Baillie* (74) Baron *Eyre* refused to permit a married woman by the effect of examination to give up for the benefit of her child her life interest under a marriage settlement; observing, that, in no instance, where trustees had been interposed, had the Court authorized the departure with the property of the wife by examining her, in the nature of a fine at law. The first case, in which such authority was clearly and unequivocally exercised, is *M'Cormick v. Buller* (75). I have seen Mr. *Cox's* note of that case; which in substance agrees

(73) Cited ante, Vol. VIII, 177.

(75) 1 *Cox*, 357. See ante, Vol. VIII, 174.

(74) 1 *Bro. C. C.* 518.

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agrees with the *Lord Chancellor's* statement in *Sperling v. Rochfort*. I know, some previous cases are referred \* to, as proceeding upon the same ground: viz. *Newman v. Cartony* (76); and *Kirkman v. Taylor*, before *Sir Thomas Sewell*: but the former was, not property, limited by marriage settlement, but a trust of a residue by Will, in default of appointment, to her heirs; which in the case of personal property means the same as "executors" and administrators." Though the residue was unascertained, Lord *Bathurst* took the consent of the wife; and directed an account. The Court might have proceeded upon the ground, that the whole property was in the wife; and, that she might have waived her equity to a settlement. In *Socket v. Wray* (77) Lord *Alvanley* expresses his dissent from that case. Without entering into the merits, it is not a case, that necessarily involves the same principle as *M'Cormick v. Buller*.

In *Kirkman v. Taylor* there was a life-interest to the wife, surviving the husband: yet in the same event there was a power to her of appointing the whole in default of children. A question might have been made, whether, as the power is framed, she could execute it during the coverture. But the appointment was held valid; and the ground of the decree was not a supposed jurisdiction of the Court to authorize a married woman to part with an interest, to which the power does not extend. *M'Cormick v. Buller* is therefore the first case, in which that jurisdiction was exercised. Nothing unfortunately is preserved, to shew the principle, upon which that decision was made. Two subsequent cases, and only two, have been referred to, as involving the principle: *Ellis v. Atkinson* (78) and *Guise v. Small* (79).

I admit,

(76) 3 Bro. C. C. 346, n.  
 565.

(77) 4 Bro. C. C. 483.

(78) 3 Bro. C. C. 346, n.  
 565.

(79) 1 Anstr. 277,

I admit, that in *Ellis v. Atkinson*, which did not end by compromise, as has been said, the decree cannot be supported without having recourse to the principle of *M'Cormick v. Buller*: yet I doubt, whether it was the distinct intention of Lord *Thurlow* to recognize and act upon that principle. The limitations in that case were the same as those in *Richards v. Chambers*, now before the Court: viz. to the separate use of the wife for life: if she should survive her husband, in trust for her, and her executors: if she should die in his life, then according to her appointment by Deed or Will; and, in default of appointment, for her executors, &c. This power of appointment could not extend to the contingent interest of the wife in the event of her surviving her husband; and, if she could part with that at all, it could be only by force of her examination in Court. The note states, that it was taken *de bene esse* at the hearing: yet, when Lord *Thurlow* sent his decree to the Register, he did not think it necessary to take any notice of her consent; but ordered the trustees to assign the fund to the husband under the appointment, dated the 1st of *December*, 1788. So, no effect was ascribed to the examination; which is not noticed: but the appointment is made the sole foundation of the decree. A considerable interval elapsed: during which the suit was under compromise. From that circumstance it may have escaped his Lordship, that there was a contingent interest in the wife; which could not be the subject of appointment. As to *Guise v. Small*, *Ellis v. Atkinson* seems to be there recognized. I do not well comprehend the ground of that case. But in *Nevison v. Longden* (80) the case of *M'Cormick v. Buller* is questioned. So *Socket v. Wray* (81) is in contradiction to that case; deciding, that the wife cannot by examination in this Court exercise any greater or other power over her settled property than

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(80) In the Court of Exchequer, 30th June, 1800.

(81) 4 Bro. C. C. 483.



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than is reserved to her by the settlement. As to the \* capital in that case the power was to appoint by Will. The wife offered to consent. Lord *Alvanley* disregarded that; and held, that she could not dispose, except in the manner the settlement had provided; holding, that the Court cannot enlarge and vary her power. His Lordship must have held, that he could not give her a power; where none was reserved to her. *Sperling v. Rockfort* (82) is the last case: but it was under such circumstances, that it was not necessary to decide the point.

From this review of the authorities it appears, that it cannot be improper to inquire, whether upon principle the jurisdiction, that has been assumed in some of them, can be supported. See, how it stands. The wife, while *sui juris*, means to make a provision for herself in the event of her surviving her husband. That is the case before the Court. Such are the terms, upon which alone she chuses to contract, while in a condition to exercise her free and unbiassed judgment. She wishes to put that out of her reach, and secure it from the effect of the influence and solicitation, to which she may be afterwards exposed. She will be told, there is no way, in which that can be better accomplished, than that, which has been adopted in these two cases; that the absence of power, the legal incapacity to act, is the best security. Why should a Court of Equity, professing to watch over the interests of married women, say, a woman, about to marry, shall not be allowed to secure to herself this kind of protection? She has it, if the Court will not interfere. She is deprived of it if the Court upon her consent, while *coverte*, annuls the contract, made for her benefit, while *sui juris*. I do not know, why this object should be aimed at; or, upon what judicial principle the means, by which it is carried into effect, rest. The husband can have no claim of right

(82) Ante, Vol. VIII, 164.

right to her interest, with his concurrence created for the benefit of the wife. In the particular cases before the Court the interests are of such a nature, that, if created by a third person, he would have no power over them; for he cannot affect her interest, which cannot take effect in possession during his life. This case is not like those, in which the husband has a right to the trust property of his wife, subject only to an obligation to make some provision for her, before he reduces it into possession. When the wife upon examination consents to relinquish that Equity, it is not by virtue of a disposing power in her, or by the intervention of the Court, that the property passes to the husband. His marital right is allowed to operate, unobstructed by the Equity; which the wife does not oppose to it. The Equity being out of the way, the right stands unqualified; and upon that the Court decrees. But here there is no pretence of right upon the part of the husband. As to the contingent interest, there is no power of disposition in the wife. On the contrary, the non-existence of such power is the ground for calling upon the Court. Then, without a right in the husband to call for a transfer, or a power in the wife to make it, what is the ground of the decree? Ordinarily, a decree or judgment of a Court does not pass the property; but merely declares the right, existing by antecedent title and disposition.

The only ground, upon which it has ever been attempted to justify this jurisdiction, is analogy to a fine at Law. But in what does that analogy consist? Fines and recoveries had their origin from real suits for the recovery of land. Though they are now merely modes of conveyance, the forms are still preserved; and the legal principles are kept entire. A title is asserted paramount to that of the married woman. Upon a fine the

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the existence of that title is recognized by an agreement after suit; and, upon a recovery, by judgment of the Court upon default of the party. An agreement upon suit had, like the *Transactio* of the Civil Law, peculiar efficacy ascribed to it; and was not open to objections, that would have been fatal to other agreements. Fines were always binding upon married women; though it was thought proper to make them liable to examination by the Statute (83) *De modo levandi fines*; but it was not merely by the examination that the fine had its efficacy. The Court of Common Pleas could not by the consent of a married woman upon examination give effect to her conveyance by lease and release. It is upon certain technical principles, and under the cover of certain forms, that she is permitted to part with her estate, without a direct violation of the rule of law, denying her any disposing power. But the proceeding of this Court is not referable to any of these forms. In annulling a settlement made before marriage the Court exercises an arbitrary authority; giving to the acts of a married woman an effect, that does not legally belong to them.

As my opinion therefore is, that there is no right in the husband to call for, or power in the wife to make, a transfer, I cannot comply with either of these applications. Therefore the petition in the first cause, and the bill in the second, must be dismissed (84).

(83) Stat. 18 Ed. I. c. 4. 1 *Ves. & Bea.* 118. *Hornby*

(84) Post, *Wollands v. v. Lee*, 2 *Madd.* 16. *Pickard Crowcher*, Vol. XII, 174. *v. Roberts*, 3 *Madd.* 384. XVI, 122. *Lee v. Muggridge*,

BLUNT v. CLITHEROW.

ROLLS.

1805.

March 29th.

**SAMUEL BLUNT**, being seised of freehold and copyhold estates, by his Will, dated the 19th of December, 1792, duly executed to pass real estate, after giving some legacies, and reciting, that on the marriage of his younger son *Henry* he had lately paid or secured to be paid to him or the trustees of his marriage settlement the whole of the fortune, secured to him, as the only younger child of the testator, by his marriage settlement, and that he had also secured to the trustees the additional sum he had intended to give him in augmentation of his fortune; which the testator had previously to his marriage bequeathed to him, gave and bequeathed to *Henry Blunt* and his wife, and another daughter-in-law, the sum of 50*l.* each for mourning; and as to all his manors, messuages, farms, lands, tenements, and hereditaments, whatsoever and where-soever, as well freehold as copyhold, which he should die seised or possessed of, or interested in; or entitled unto, either in possession, reversion, remainder, or expectancy, not included in his marriage settlement, he subjected and charged the same to and with the payment of the above-mentioned legacies, and also to and with the sum of 3000*l.* secured by a bond from him to the trustees of his son *Henry's* marriage settlement, and also to and with all other his just debts, over and above what his personal estate and effects should extend to, pay; and which he directed should be first applied for that purpose; and subject and chargeable, as aforesaid, he gave and devised all his said manors, &c.; upon trust by sale or mortgage to raise such sum for the payment of his debts, legacies, &c. as his personal estate not specifically bequeathed should not extend to pay; and,

Devise of all copyhold estates, in general terms, unrestrained, to a child, passes all copyholds surrendered and not surrendered to the use of the Will.

The point, that the doctrine of Election reaches the customary heir, claiming a copyhold estate for want of a surrender, admitted at the bar.

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and, after payment thereof, he directed, that his trustees should settle, convey, and assure, all the said manors, &c. which should not be sold for the purposes aforesaid, to such person and persons, and for such ends, intents, and purposes, as after expressed.

The testator then directed the limitations, to his son *William Blunt* for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; and after his decease to *Francis Blunt*, the son of *William*, in the same manner; with remainder to his first and other sons, and to the other sons of *William*, successively in tail male; and, in default of such issue, to his youngest son *Henry Blunt*, and his heirs.

By a codicil, dated the 10th of *June*, 1794, the testator, reciting the disposition of his personal estate for his debts and legacies; that the remainder should be charged upon his real estate; that his personal estate would not be sufficient; and that he was desirous, that certain parts should not be so sold, but should go and be enjoyed by his eldest son *William Blunt*, who “ upon “ my decease comes into possession of my house and “ estate, wherein I now reside at *Horsham*,” bequeathed to *William Blunt* all the household furniture, linen, plate, and other specific articles, utensils of house-keeping, husbandry, and gardening, in and about his said house and premises, and the liquors and stores, &c. and all his farm, stock upon the farm or land, occupied by himself, for the sole use of *William Blunt*, his executors, &c.

By another codicil, duly executed to pass real estate, dated the 15th of *November*, 1798, reciting the charge in the terms of his Will, he thereby farther charged all his said manors, messuages, farms, lands, tenements,  
 and

and hereditaments, whatsoever and wheresoever, as well freehold as copyhold, which he should die seised or possessed of, or interested in, or entitled unto, either in possession, reversion, remainder, or expectancy, not included in his said marriage settlement, with the payment of the farther sum of 7000*l.*; which he thereby gave and bequeathed to his said son *Henry Blunt*.

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 ~ ~  
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*William Blunt* died in the life of the testator; leaving *Francis*, his eldest son, and heir at law; who also was the heir at law of the testator. After the testator's death the bill was filed on behalf of *Francis Blunt*, then an infant, by his mother and next friend; claiming either as heir at law or devisee.

The Master's Report, made under the decree, directing the necessary accounts and inquiries, stated, that the testator at the date of the Will and Codicils and at his death was seised to him and his heirs, according to the custom of the manors of *Barcombe*, *Taring cum Marlepost*, and *Ditchelling*, respectively, of premises and land; and of all which manors the tenure was Borough *English*; and the lands held of the two former manors were not surrendered to the use of the Will: but those held of the manor of *Ditchelling* were surrendered to the use of the Will in 1764.

Mr. *Piggott* and Mr. *Kenrick*, for the Plaintiff.

The question is, whether the copyhold estates passed by the Will. If the testator's intention was to devise those estates, the Defendant *Henry Blunt*, who, if they are not well devised, would take them, as heir by Borough *English*, must elect. That is settled in *Standish v. Standish* (85), *Pettiward v. Prescott* (86), and many other cases.

Upon

(85) In the Court of Exchequer.

(86) Ante, Vol. VII, 541.  
*Rumbold v. Rumbold, Wilson*

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Upon the Will and Codicils, particularly the last codicil, all the copyhold estates passed. The distinction is taken between those, which were surrendered, as the principal estate was twenty-eight years before the Will, and those, which were not surrendered; and it is contended, that the Will applies to the former only. The testator's intention was to dispose of all his lands, generally, with the single exception of what was settled upon his marriage. Where all the testator's copyhold lands, or merely his "copyholds," are devised, that distinction, whether they are surrendered, or not, has not been adopted; unless restraining words are found in the Will; and all the authorities admit, that without such words the general devise will pass copyholds, not surrendered, as well as those that are surrendered. In *Gascoigne v. Barker* (87) the words related to the copyhold surrendered; and the whole reasoning of Lord *Hardwicke* turned upon that. In this case every qualification is excluded; except that, which is expressed. In *Banks v. Denshaw* (88) there was much more ground for the objection in favour of the heir: yet it did not prevail either in that instance or in *Rumbold v. Rumbold* (89). In *Wilson v. Mount* (90). Lord *Alvanley* limited the devise upon the restrictive words; holding, that, if those words had not occurred, and the devise had been of all his copyhold

*son v. Mount*, III, 65, 191.

But, though upon the authorities the doctrine of election reaches the customary heir, claiming a copyhold estate, not surrendered to the use of the Will, it does not affect an heir at law, the devise failing by infancy, or under the Statute of Frauds: *Hearle v. Greenbank*, 1 *Ves.* 298. 3 *Atk.* 695. *Sheddon v. Goodrich*,

ante, Vol. VIII, 481, and the note, 497; unless an express condition is imposed upon him: *Boughton v. Boughton*, 2 *Ves.* 12. Upon Election generally, see the notes, ante, Vol. I, 523, 7.

(87) 3 *Atk.* 8.

(88) 3 *Atk.* 585. 1 *Ves.* 63.

(89) Ante, Vol. III, 65.

(90) Ante, Vol. III, 191;

see the note, 192.

hold lands, it must have been taken, that he meant, whether surrendered, or not. Another class of cases is applicable; upon the point, whether leasehold estate would pass with freehold under a general devise of all lands; which was much considered in *Thompson v. Lawley* (91) and *Watkins v. Lea* (92) by the Lord Chancellor. The heir by Borough *English* is not entitled to the privilege of the Common Law heir.

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Mr. Romilly and Mr. Heald, for the Defendant.

The only question is, whether the intention was, that all the copyhold estates surrendered, or not surrendered, should pass by this devise; for, if that was the intention, there is no doubt, upon the point of election, that the Defendant, taking under the Will, must give effect to all the dispositions of the Will; and therefore must surrender.

The principle, established by the authorities, last referred to, following *Rose v. Bartlet* (93), is, that where the Will has general words, and the testator has estates properly answering that description, other estates, which, if he had none of the former species, would come within the description, shall not pass. Besides the instance in those cases, that general words, applicable to freehold estate, shall not pass leasehold, the testator having freehold, under a devise, in the most general way, of all the testator's estates whatsoever and where-soever, if he has freehold estate, a copyhold estate will not pass even for a wife and children: *Hawkins v. Leigh* (94). The distinction, as to supplying the want of a surrender for a wife and children, and for creditors, though represented as strange and unintelligible, is not irrational; but stands on sound principle.

The

(91) Ante, Vol. V, 476.

(93) *Cro. Char.* 293.

2 *Bos. & Pul.* 308.

(94) 1 *Atk.* 387.

(92) Ante, Vol. VI, 633.



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The ground, upon which the Court has proceeded in such cases, is this: they look to the intention; and supply the surrender for the wife and children; conceiving, that the testator intended to satisfy the natural obligation. But, if he has freehold estate, which passes by the devise, he has provided for them; and it is only necessary, that he should make a provision; not, that he should give them all his property. By supplying the surrender in such a case, therefore, the Court would do more than satisfy the natural obligation. But in the case of creditors, if the freehold estate is not sufficient for the debts, the obligation to pay all the debts is not satisfied. The departure from the rule of *Rose v. Bartlet* (95), in *Addis v. Clement* (96), and some other cases, was much disapproved by the Lord Chancellor in *Thompson v. Lawley* (97), and *Watkins v. Lea* (98). It is said, the restriction is confined to the estates, included in his marriage settlement: but, if the testator had not mentioned copyhold estate, and his copyholds were not included in the settlement, and none were surrendered to the use of the Will, would they have passed? If not, the necessary consequence is, according to *Hawkins v. Leigh* (99), that, using the word "copyhold," and having copyholds, surrendered, which will answer that word, the copyhold, not surrendered, will not pass.

The case of *Banks v. Denshaw* (100) turned upon the construction of the whole Will; shewing the intention, that all should pass. Here there are merely the general words: not a single expression, indicating an intention to pass the copyhold estates, not surrendered. The opinion,

(95) *Cro. Car.* 293.(98) *Ante*, Vol. VI, 633.(96) 2 *P. Will.* 456.(99) 1 *Atk.* 387.(97) *Ante*, Vol. V, 476.(100) 3 *Atk.* 585. 1 *Ves.* 63.2 *Bos. & Pul.* 303.

opinion, expressed by Lord *Alvanley* (1) in *Wilson v. Mount*, is a mere *dictum*, in opposition to the principle, upon which the Courts have always acted. As the testator cannot by Law act upon copyhold estate, unless surrendered, this Court will not presume such an intention, unless clearly shewn: otherwise the copyhold estates, particularly when coupled with a devise of freehold estate, must be construed copyholds, put into such a state, that the Will can operate upon them: *i.e.* surrendered.

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Mr. *Piggott*, in reply, was stopped by the Court.

*The MASTER of the ROLLS.*

I should not have been surprised, if there had been cases, determining, that a testator, giving all his copyhold estates, should be held to mean such as are capable of passing by Will: *viz.* copyholds surrendered. Such a rule would be correct in technical reasoning: but I doubt, whether it would be a just criterion of the intention; for it does not occur to an ordinary man, that all his copyhold land can be more effectually given than by a devise of all his copyhold land. In the two cases before Lord *Hardwicke* he thought, a devise of "all my copyhold lands," is sufficient to carry copyholds surrendered, and not surrendered. If the opposite construction is put upon those words, copyholds, not surrendered, could never pass, except, either, where there were no other copyholds to answer the description, or, where the testator had added the words, "whether surrendered or not surrendered." The mere general words would not be sufficient in any other case. But in both these cases it was held, that, where those general words are used, it is necessary to find

(1) Ante, Vol. III, 194.

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find restrictive words, to confine the devise to copyholds surrendered; for, if that is not the rule, the whole reasoning in *Gascoigne v. Barker* (2) was nugatory; and in *Banks v. Denshaw* (3) the reasoning would be false. In the former case the words are not more general than in this case. Lord *Hardwicke* does not say, that these words are insufficient to pass unsurrendered copyholds. That would have put a short end to the case; and it would have been quite nugatory to inquire, whether words, in themselves insufficient to pass copyholds unsurrendered, were restrained to copyholds surrendered only. But the whole argument turns upon the restrictive clause. In *Banks v. Denshaw* Lord *Hardwicke* first examines, whether the words, contended to be of the same import with those in *Gascoigne v. Barker*, have the restrictive effect; and determines, that they have not. The consequence is, that the general words are sufficient to pass copyholds both surrendered and not surrendered. Lord *Hardwicke* clearly arrives at that conclusion, before he adverts to a circumstance, decisive, if any doubt existed: a direction, that the said copyhold part shall be subject to the payment of a mortgage on the part, that was surrendered; which, Lord *Hardwicke* observes, puts the intention out of all doubt; if that was not sufficiently plain before. How sufficiently plain? Only by the general words, "all and every my freehold and " copyhold messuages."

Having Lord *Hardwicke's* opinion so distinctly expressed upon the effect of the general words, some authority would be necessary, to induce me to resort to a more artificial construction. My opinion therefore is, that these words are sufficient to pass all the copyhold estates.

(2) 3 *Atk.* 8.(3) 3 *Atk.* 685. 1 *Ves.* 63.

BROOME v. MONCK.

1805.

March 19th,

25th.

April 8th.

**T**HE bill was filed by *Richard Pinniger Broome*, a nephew and devisee of *Richard Broome*, praying a specific performance of a contract, entered into by the devisor, for the purchase of an estate for 7925*l.*; and, that the executors may be decreed to pay the residue of the purchase-money, beyond the deposit at the sale by auction out of the assets; and, if the Defendants, the vendors, are not able to make a good title, or for any other reason the contract cannot be carried into execution, then that the amount of the purchase-money may be invested in the purchase of other lands, to be conveyed to the like uses as are expressed in the Will concerning the testator's real estate. By the Will, which was previous to the date of the contract, the devisor gave all his freehold, copyhold, and leasehold estates, to his nephew *Richard Pinniger Broome*, for the term of 99 years, if he shall so long live; and from and after his decease, to the heirs of his body; and, for want of such issue, to the right heirs of *Richard Pinniger Broome* for ever.

Devisee, claiming the benefit of a contract for the purchase of an estate, directed to go to the uses of the Will, the title proving defective, has no claim upon the personal estate, either to have the purchase-money, or another estate purchased, or the purchase completed notwithstanding the defect,

The devisor contracted for the purchase, upon the 26th of *June*, 1802; the particular expressing the usual terms, that the remainder of the purchase-money beyond the deposit should be paid upon a good title being made, &c. Upon the 24th of *July* following he made a codicil, duly executed to pass real estates, reciting the contract since the execution of his Will; and directing, that such contract should be so carried into execution; that the purchase-money should be paid out of his personal estate; and that the said estates so purchased should go to the like uses as are expressed in his Will concerning his other real estates.

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The Defendant *Christopher Broome*, another nephew of the testator, claiming under a bequest of the residue of the personal estate, to be laid out in the purchase of real estates, and settled to the use of *Christopher Broome* for life, with remainders to the heirs of his body; and, for default of such issue, to his right heirs, by his answer insisted, that, if a title cannot be made, no part of the personal estate ought to be applied in the purchase of any other estate for the benefit of the Plaintiff.

Upon the Master's Report the title proving defective, the cause came on for farther directions, upon the claim of the Plaintiff to the benefit of the contract.

Mr. *Fonblanque* and Mr. *Wear*, for the Plaintiff.

The question is, whether the Plaintiff, whom the testator clearly intended to take the benefit in respect of this contract, shall be deprived of that benefit by the defect of the title of the vendors. Upon that point the general principle is, that this Court will effectuate the intention, as nearly as can be, with reference to any purpose of bounty. If it is not to be effected in the manner and form prescribed by the testator, the Court will resort to other means to give it effect, if possible. This case is immediately within *Whittaker v. Whittaker* (4). The only circumstance of distinction is, that in that case at the time of making his Will the testator had contracted for the estate. But that is no real difference; for the codicil in this case must be considered as incorporated with the Will. In that case, as in this, the testator directs the purchase to be completed by his executors out of his personal estate. Though there was no want of title, a subsequent passage shews, that did not influence the judgment; for Lord *Alcanley* says,

(4) 4 Bro. C. C. 31.

says (5), a defect of title in the vendor would not have been decisive against the devisee; and though it had become impossible for the vendor to perform his contract, the devisee could not possibly be disappointed. At the conclusion of the judgment (6) Lord *Alvanley* anticipates this case: a defect of title.

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*The Lord CHANCELLOR.*

The case of *Whittaker v. Whittaker* is a very clear case; though the *dicta* go a great way. The case is no more than this. Sir *Robert Mackreth*, the vendor, had a good title. The estate at the death of *Whittaker* in Equity belonged to the devisees of his real estate. Sir *Robert Mackreth* objected, that he was not to be held to the contract for ever; and the embarrassment of *Whittaker's* affairs gave him a right to be off; unless the contract should be completed without delay. But, as to the devisees of the land and the legatees of the money, their interests were completely fixed at the death of the testator: and then the only question was, whether the embarrassments of *Whittaker's* affairs, giving that right to Sir *Robert Mackreth*, should vary the rights as between the devisees and legatees.

The questions here are, whether the judgment of the Master against the title is decisive as between the devisees and legatees, there being a good title, or not: 2dly, If the devisees of the real estate can say, they will have the estate, whether there is a good title or not, paid for by the personal representative: 3dly, Whether they can repudiate the contract the testator entered into; and can have a right to consider the testator as having contracted to buy some other estate for them.

For

(5) 4 Bro. C. C. 34.

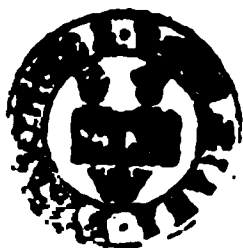
(6) 4 Bro. C. C. 37; see post, Vol. XIV, 205.

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For the Plaintiff.

This case differs from *Whittaker v. Whittaker*; for this is between specific devisees. The Defendants are in the same situation: the residue being to be laid out in land. Even *Green v. Smith* (7) was between the heir at law and executor. But this is between two devisees by the same testator: both specific devisees, equal in value as near as possible. This is like the case of exchange; *The Earl of Coventry v. Coventry* (8).



Mr. Romilly, Mr. Thomson, and Mr. Bell, for the Defendant *Christopher Broome*.

Two grounds are stated: 1st, that, as the contract cannot be carried into execution, the Plaintiff is entitled to have the purchase-money applied for his benefit, either in another real estate, or as money: 2dly, that he has a right to say, he will take the estate, as it is; whether the title is good or bad. Under this devise to the Plaintiff for 99 years, if he so long live, with remainder to the heirs of his body, the Plaintiff has not a right to elect to take any estate: but other persons, not in existence, are interested. The testator gives the whole residue of his personal estate upon trust to be laid out in real estates for *Christopher Broome*. Seeing these estates advertised he purchases them by auction: but under the conditions of sale, to pay a deposit immediately; the remainder of the purchase-money at a certain time, a good title being made; with the usual condition for a resale upon default, &c. Then by the codicil, reciting, that he had contracted for the purchase of those estates, he directs that contract to be carried into execution, the purchase-money to be paid out of the personal estate; and the said estates so purchased to go to the like uses, as are expressed in his Will

(7) 1 *Atk.* 572.(8) 2 *Atk.* 366.

Will concerning his other real estates. As to the first question, neither of the two cases relied upon apply. But by the extra-judicial *Dicta*, appearing in the Report of *Whittaker v. Whittaker*, Lord *Alvanley* is represented to state that to be the law of the Court, which is not supported by any decisions or *Dicta*. The case called for no such doctrine; and has, as your Lordship has observed, no application to this. The whole difficulty arose from the delay, occasioned by the abandonment of the contract by the personal representative. A long litigation took place. Three years subsequent to the contract Sir *Robert Mackreth*, tired out by the delays, filed his bill; tendering an election, either to carry the contract into execution, or to give it up. They elected not to execute it. The only question, which could hardly admit of doubt, was, whether the rights of the devisees and legatees could be affected by the conduct of the representative.

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*The Lord CHANCELLOR.*

No one had an idea at the time of the decision by Lord *Kenyon*, before whom Sir *Robert Mackreth's* bill came, that, if he had been dead, his heir at law could have said, the embarrassments of *Whittaker's* affairs should break the contract; and he would keep the estate.

For the Defendant.

With reference to the passage in the Report of *Whittaker v. Whittaker*, that has been relied on, the question is, has the testator made a specific devise of that particular estate; or directed, that so much of his personal estate shall be converted into real estate for this devisee? If it is a specific devise, and he has not that estate at his death, whatever was his intention, and though it may have been disappointed by something,  
not



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not in his contemplation at the time of his death, upon the principles of the Court as to specific devises it cannot take effect. If it is not a specific devise, but a general intention to have so much of the personal estate converted into real; and he has given the direction as to this particular estate only for convenience, then it must be admitted, the devisee is entitled, this contract failing, to have the amount laid out in other estates. That is the only question to be decided. *The Earl of Coventry v. Coventry* (9) was a case of that kind; and it was put by Lord *Hardwicke* upon that ground; that, where the direction is to lay out the money in land, generally, or in a particular county, an estate is indicated to the trustees; and, the particular mode failing, still the objects of that bounty would be entitled to the benefit. The other cases, referred to in *Whittaker v. Whittaker* (10), do not apply. *The Attorney-General v. Green* (11) was upon the *Cy pres* doctrine as to charity. *Mayet v. Mayet* (12) is very strong to shew, that in case of a specific devise, if the thing fails, the devisee has no right to any thing else; and the Report of that case, though short, in general corresponds with the Register's Book. The Report states, rather shortly, that the legacies were to be paid "out of the property." By the Register's Book it is "out of the profits so put out at interest:" out of the profits of the farm he directs to be carried on; and the *Master of the Rolls* held, they were legacies, to be paid out of the profits of the farm, when the legatees should attain twenty-one; and, as it appeared, that the farm could not be carried on, they could never be raised. It was held therefore to be in the nature of a specific legacy; which by some event could not take effect.

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(9) 2 *Atk.* 366. (11) 2 *Bro. C. C.* 492.
 (10) 4 *Bro. C. C.* 31. (12) 2 *Bro. C. C.* 125.

The next question is, whether the Plaintiff has a right to say, he will take this estate with such title as there is. Upon the terms of the contract he cannot have the estate; though he would accept it without a title. The contract was to purchase, only if a good title could be made; in the usual form "upon having a good title." The codicil recites, that he has entered into a contract for the purchase of this estate; directs such contract to be carried into execution, the purchase-money to be paid, &c.; and the said estate so purchased to go to the like uses as his other estates. Has the Plaintiff a right now to say, he will take the estate, though a good title cannot be made? That is perfectly a different contract. That particular estate is devised, when the representative shall by the contract become owner of that estate. The condition is not performed; for he never can be owner.

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Mr. *Martin*, for the executors, contended, that it could not be the intention of the testator, that they should purchase a bad title.

Mr. *Fonblanque*, in Reply.

This case and *Whittaker v. Whittaker* (13) stand upon the principle of compensation, where it can be made, in respect of the disappointment of the testator's purpose. The cases of election are applicable. Compensation is made in respect of the election to take against the Will. In general, it is true, a specific devisee must have the specific estate, or nothing.

If the Plaintiff is not entitled to have this sum laid out in the purchase of other land, he is entitled to the benefit of the contract: be it greater or less. What has the

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the testator given? The benefit of this contract. Then the devisee may forego the objections to the title. The testator must have contemplated the possibility, that this title might be defective. Suppose, the devise had been to the Plaintiff in fee instead of a limited interest: might he not have taken the estate, such as it was, or the money? Suppose, it was to him in tail: might he not under the late Act (14) have said, he would have the money? Suppose their title defective as to one-sixth only, and good as to five-sixths: a deduction must be made from the purchase-money; as if there was a defect of quantity; for which compensation might be made.

The Lord CHANCELLOR.

The question is, what are the equities of the parties; regard being had to what the Court must declare to be the purpose of the testator upon the Will and Codicil? The Will devises freehold estates to uses, in which uses the Plaintiff would have partial benefits: viz. a term for ninety-nine years, if he shall so long live, with remainders over; and the testator afterwards disposes of the residue of his personal estate; which he directs to be laid out in land, to be settled to other other uses. Therefore, when he had concluded the Will, he had declared, that such land as he actually had should devolve in a certain course, and the land to be purchased with the residue of his personal estate should go to other persons; and he was content, that if he should die the moment afterwards, the different branches of his property should go in those different modes. Afterwards he entered into a contract for the purchase of an estate: the particular containing one condition, implied in almost every contract, but expressed in this, that he was to become the owner of the estate, if a good title should be made.

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He was placed therefore in circumstances, in which from that moment until his death, or until the agreement should break off, he was capable of devising the estate; as being in equity the owner.

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The question was very materially argued, as if immediately after the contract he had re-published the Will; and, if he had said, he gave all his messuages, lands, tenements, and hereditaments, to the uses, to which the freehold estate was given by the Will, it would be difficult to argue, that he had not in a different form expressed in effect every thing he said by his codicil; for, if he had devised in that manner, the Plaintiff would have taken this estate, provided a good title could be made, under that disposition; and the executors would have been bound to pay for it for the benefit of the Plaintiff. That duty of necessity is imposed upon them, whether expressed or not.

Estate contracted for after a general devise will pass by a republication; and must be paid for out of the personal estate.

It was also materially observed, that every devise of land, whether particular, or by the words "all my messuages, lands, tenements, and hereditaments" is a specific devise; and must be so; for the devisor as to real estate of inheritance can devise only what he has; and he may devise it, if he has it at the date of the Will, and continues to have it until his death. A devise of land of inheritance, in whatever form, is specific (15). The first question then is, whether the doctrine of this Court is, and the *dicta* in *Whittaker v. Whittaker* will establish, that, if a man, having lands, and having acquired an equitable title in other land by contract, makes a disposition of all his messuages, lands, tenements, and hereditaments, by which unquestionably he will specifically devise the estate, in which he has acquired

Every devise, whether particular or general, is specific; as the devisor must have the land at the date of the Will, and continue to have it until his death.

By a general devise an estate, in which the devisor has acquired the equitable title, passes.

(15) Ante, Vol. II, 427.

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acquired the equitable title, if afterwards it becomes clothed with the legal interest, the effect of that is, that he devises, not only the lands he has in Law or Equity, but also those lands, which he has not either in Law or Equity; and the question is, whether it will be construed to mean, that he gives all the lands he has, and all he supposes he shall have in Equity, upon the supposition that he has them; but, if that supposition should turn out to be ill founded, the Court is to conclude, that he gives, not only those lands he has, and in which he fancies he has acquired an equitable title, but, that it is a direction, to operate through all its consequences, as if he had stated, that, if those estates could never be conveyed, his executors should lay out a sum of money, equal to the price of lands he had agreed to purchase, upon any other lands. That is a very strong and new doctrine.

As to the decision in *Whittaker v. Whittaker*, it went upon a principle, involving nothing of that kind; for it was simply this case. Sir *Robert Mackreth*, having a good title, which he was quite ready to convey, had contracted to convey to the testator of the Defendants. *Whittaker* therefore became the owner in Equity. Nothing had passed between the parties in his life. When he died, all question between the real and personal representatives was closed by his death without rescinding the contract. But Sir *Robert Mackreth* had a right to say, the contract should be performed in a reasonable time, and should not hang over him for ever; and therefore he had a right to demand, that it should be made good in a given time; or that it should be given up. With reference then to the question between the real and personal representatives and Sir *Robert Mackreth* the Court said, without prejudice to any questions as between the representatives themselves, it was not fit, that Sir *Robert*

Sir Robert Mackreth should be held to the agreement. But that was an agreement, which up to that moment the Court declared bound all the parties, if all would execute it; and therefore bound *Whittaker* at his death, and *consequently his representatives. Therefore, not determining the interests as between *Mackreth's* real and personal representatives, if he had died, that decree decided only, first, that an individual shall not be held bound for an unreasonable time; and 2dly, if the party, with whom he contracted, died with the interest in equity in him, the effect of that decision should make no difference between his representatives real and personal; for he was vested with a complete demand, provided a good title could be made. It would have been very different, if *Whittaker* could never have had a good title from *Sir Robert Mackreth*; for then it would have been very difficult to say, that as between the real and personal representatives the *quantum* of objection can possibly be material, if it amounts to so much of objection, that the person they both represent could have said, there was sufficient to authorize him to refuse to take the estate; and all those cases must be decided upon the same principle; if all of them furnish an objection to that amount. If the vendor could have said, the vendee should take the estate, having an allowance out of the purchase-money, that gives a different turn to the argument. As between the heir and the personal representatives, *Lacon v. Mertins* (16), *Buckmaster v. Harrop* (17), and other cases, establish the general principle, that, whatever is the state of liability of the party himself to take at

Liability of
real and per-
sonal repre-
sentatives in
respect of a
contract re-
gulated by

(16) 3 Atk. 1.

(17) Ante, Vol. VII, 341.

that of the party at his death.

If he could not be compelled to take the estate, the heir cannot insist on having it, and that the personal estate shall pay for it.

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Devisee not to
be more fa-
voured than
a particular
legatee.

his death must be the state of liability, to be considered upon questions between those representing him after his death; and, if at his death he could not be compelled to take, clearly the heir could not say to the executor, "I will have the estate; and you shall pay for it." So, the case of a devisee, claiming the estate, and the party, to pay for it, the party, upon whom the personal estate devolves, not by the act of the party, but by operation of Law; as, if he dies, having devised his real estate, and intestate as to his personal estate: again, if having disposed of both; for there is no principle for the devisees of the real estate to be more favoured than an express legatee of personal estate. There is as much intention, that the latter shall take the personal estate, (I do not state it as to a mere residue, but a given sum), as that the real estate shall go to the devisee by the act of the devisor.

The first question among all these parties is, if the testator was not bound, can the devisee say, he will have, not the benefit of the contract, as the devisor meant to have it, but as he might have reduced it, if he had thought proper; but with reference to which he stood neuter all his life: or, may the devisee say, he will have it, because the testator might have had it, such as it was. That is to be considered with reference to general cases and to the particular case. It is put thus: suppose the title defective as to one-sixth only, and good as to five-sixths, of the estate. But it must also be put the other way; and then it must be said, that, though under his Will, previous to the contract for the estate, to be enjoyed with the mass of inheritance, he meant his personal estate to be laid out another way, yet, if the person, with whom he contracted, had nothing but a lease for 99, or even 21, years, the person, to whom he meant to give the benefit of

of that contract, might have said, that, though nothing was mentioned but a contract for the fee-simple, yet, finding only a term, he shall disturb the personal estate, in order to have what is so different from what the testator intended. It is very difficult to make that out.

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The cases of Election do not apply, until the previous question is determined; for, if it is made out, that this testator has given so much as will buy this estate or some other estate for the Plaintiff, that is not a case of election; for then so much personal estate as may be necessary to buy this or some other estate is expressly taken away. But Election is, where the testator gives what does not belong to him, but does belong to some other person; and gives that person some estate of his own; by virtue of which gift a condition is implied, either that he shall part with his own estate (18), or shall not take the bounty. But here the question is not that; but, whether he has taken away from these Defendants part of that personal estate, which was the testator's; and was given to be laid out in the purchase of land.

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The case will turn upon this; how far the *Dicta*, supposed to have fallen from Lord *Alvanley* in *Whittaker v. Whittaker* (19), can be supported by authority or principle. It must go this length; that, where a man, having legal estates, and equitable estates under a contract, devises all his messuages, lands, tenements, and hereditaments, and dies, standing quite neuter as to the equitable estates under the contract until his death, the Court must say, those words operate to the same effect as giving all his lands, &c. legal and equitable, provided the latter were

Election, where testator gives what belongs, not to him, but to another; to whom he gives some estate of his own; upon an implied condition, that the other shall part with his own estate, or not take the bounty.

(18) See the notes, ante, (19) 4 Bro. C. C. 31.
Vol. I, 523, 7.

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[ \*610 ]

Whether a bequest, to be laid out in land in a particular parish, shall, if land cannot be procured there, be laid out elsewhere, *Qu.*

were conveyed; and, if not, then the interpretation is, a wish to give all, if they can be had specifically; and if not, then he devises the legal estates, such as he can pass, and such of his equitable estates as he or his representatives after his death shall be able to procure a title to; and as to all the rest it is a direction to the executors, and against those, to whom the testator has given the personal estate, to lay out so much as shall be necessary, not to procure a title to that estate, but to procure a title to any other estate they can procure. If it does not amount to that, I do not see, how the case is to be made out; for I agree, if he had directed, that out of his personal estate a sum of money should be laid out in the purchase of a real estate, there is no doubt, it must be laid out: or, if it was to be laid out in a particular county, there the Court has gone upon this; that it is to be taken, that there is some estate in that county; and therefore it may be procured. But if it is to be in a particular parish, there are the conflicting opinions of Lord *Thurlow* and Lord *Rosslyn*. Lord *Thurlow* thought, the money could not be laid out any where else: Lord *Rosslyn* thought, it might be laid out elsewhere; if no land could be procured in that parish.

My difficulty here is, whether a person, devising his equitable estate, does by that not only give the equitable estate he supposes his, but includes in that a direction to purchase other estates; if it turns out, that he was mistaken in supposing that estate, contracted for, to be his: whether he is not only to be taken to mean, that his contract should be executed, but also, as he has said so much, this Court is farther to infer, that, though the title to that estate cannot be made, another estate shall be purchased: a question which has never been so determined. In *The Earl of Coventry v. Coventry* (20), exchange void by eviction.

change

change being the subject, in which in case of eviction the party evicted would take the estate given in exchange, Lord *Hardwicke* thought, the intention upon the whole was, that that estate should be bought for those, to whom he finally gave it, if it could be : but, if not bought, they should have the other estate to go in lieu of it.

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I have a strong inclination, that this is carrying the doctrine of this Court much farther than has been done before ; but I will consider these cases.

[ 611 ]

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*The Lord* CHANCELLOR, (after stating the Will, Codicil, &c.)

March 25th.

At the date of the codicil, which was made after the contract, the testator was in equity the owner of this estate, if it could be effectually conveyed to him ; and a simple republication of the Will with the general words, " all my freehold, copyhold, and leasehold estates " would have operated to pass the equitable title ; if afterwards, in his life or after his death, it became cloathed with the legal estate. It is of necessity, that, where a person has contracted to sell, if the vendee dies, before the contract is executed, in which case of necessity a question arises between the representative of the vendee, to the consequence of such an accident the vendor must be taken to look at the time of making the contract ; and he has no reason to complain, even if a dispute between the heir and executor brings forward an investigation of the title ; as, the contract being to be executed at a future period, it is incident to such a contract that questions may arise by the death of either party between individuals, who have rights as between each other, before it can be decided, how the question by a third party against both can be decided. If a good

Equitable title, acquired after a general Devise, passes by re-publication.

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Devisee or  
heir entitled  
to the benefit [\*612]  
of a contract  
for purchase,  
and to an ap-  
plication of the  
personal es-  
tate in pay-  
ment, if a title  
can be made:  
not otherwise.

title could have been made in this case, there would have been no question; for then the common doctrine must have applied; that a person acquires the equitable title by the contract, and dies before payment: if a good title can be made, whether he dies with or without a Will, it must be made; and the personal estate must \* pay for the advantage of the devisee in the one case, or of the heir in the other. Upon that principle a reference was directed to the Master as to the title; and the result is, that a good title cannot be made.

Two questions arise upon that: first, whether the devisees are entitled to take the estate with a bad title, if they think proper; and the person, representing the testator as to his personal estate, can be compelled by the devisee to pay, either the whole purchase-money for the estate, connected with a bad title, or out of the purchase-money as much as it is worth, so connected with a bad title; and then an ulterior question occurs, whether that devisee could say, he would have, not only the estate, connected with a bad title, at its worth, but also so much more as the difference between the value of the estate, as it is, and the purchase-money, agreed to be given for it with a good title; to be laid out in land; which is the same as claiming to reject it; but, doing so, claiming either by force of the codicil, or the equity independent of it, to be entitled to have the whole sum of 7925*l.* laid out in other lands to the same uses.

As to the first question, I have not met with any case, that has induced me to suppose, that, if this were between the heir and the personal representative, it would be possible for the heir to say, though the title was doubtful, yet, being the real representative, he is entitled to take it, as it is; though the ancestor never  
meant

meant so to take it; or intimated any purpose of retiring from that situation, in which he had a right either to insist upon a good title, or to refuse the estate; and, though there is no proof, that the ancestor would have paid for the estate with a bad title, yet the heir can insist, that the personal representative shall pay for it \* out of the assets. None of the cases cited give any colour for that. *Green v. Smith* (21) indeed seems to state a doctrine quite inconsistent with that; which is accurate in *Atkyns* as to this point; for I find it in Mr. *Joddrell's* notes, shortly stated in the same way: viz. that, where the ancestor after the date of the Will agrees for a purchase, the heir would have a right, if there was a good title: otherwise, if not: but it would be going far to say, that, though he cannot have the land, he shall have the money, to be laid out in other land. That is the declaration of Lord *Hardwicke*, stating the distinction between that proposition and this; that, where a man has agreed to lay out money in land generally, and devises his real estate, before such purchase is completed, the money agreed to be laid out will pass to the devisee; for that is not the case of a devise of real or personal estate, which the testator has; but is a testamentary declaration, how a real estate is to be acquired. *Green v. Smith* also in Mr. *Joddrell's* notes affirms the same proposition.

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Contract for purchase, generally: by a devise of the real estate, before the purchase is completed, the money will pass.

Then it is said, there is a difference between an heir and a devisee; and the two cases cited upon that are, *The Earl of Coventry v. Coventry* (22), in *Atkyns*, and also in Lord *Hardwicke's* notes, and the name of *Coventry v. Carey*; and *Whittaker v. Whittaker* (23). As far

(21) 1 *Atk.* 572. *Savage v. Carroll*, 1 *Ball & Beat.* 265.

(22) 2 *Atk.* 366.

(23) 4 *Bro. C. C.* 31.

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By a contract for a [*614] purchase, if the vendor has a good title, in equity it is the real estate of the purchaser; and will pass by his Will; or descend; and the devisee or heir may call for application of the personal estate in payment.

far as *Whittaker v. Whittaker* contains any doctrine necessary to the decision, it is a decision, which, taken with the doctrine connected with and necessary to determine it, proves no more than this: just the converse of the proposition I have stated, and equally prevailing in the case of heir or devisee. It is clear in both cases, * that, if a man contracts for a purchase, and the vendor has a good title, by force of the contract in Equity it becomes his real estate; and, therefore, if he dies without a Will, it descends upon his heir, if with a Will, his Will containing words to pass it, his devisee will take; and either has a right to call for an application of the personal estate to the payment of the money. In *Whittaker v. Whittaker* from the moment of the contract, subject only to a question, which it was admitted did not exist there, for the vendor could make a title unquestionably, *Whittaker* was owner of the estate in Equity; and Sir *Robert Mackreth* of the price. One point, independent of any question about title, was, whether the vendor had not a right either to have the contract executed in a reasonable time, or to be delivered from the obligation. In the life of *Whittaker* there was no controversy between them: but it was understood during his life, that by force of the contract both were bound. *Whittaker* at his death was in Equity the owner of the estate, and therefore there was no difference upon the question in such circumstances, as affecting an heir or a devisee. *Whittaker* had been engaged in a considerable trade; and his personal estate was under circumstances so complicated, that the purchase-money could not be collected. Therefore four or five years after his death, till which time Sir *Robert Mackreth* admitted that *Whittaker* was to be considered owner, a bill was filed by Sir *Robert Mackreth*, to have the contract executed, or delivered up.

Lord

Lord *Kenyon* decided, and was right in deciding, that the contract should be delivered up; but upon principles, leaving undisturbed any question, that could arise between the real and personal representatives; and there is no doubt, that, if the real representative could then have said, he was ready out of his own pocket to pay, the Court would have decreed him the estate; * and have given him an Equity afterwards to call upon the personal estate to reimburse him; and it is quite clear, that, if the real representative had been an heir instead of a devisee, the question would have been just the same; for, the title being good at the death of *Whittaker*, and no question between the parties to the contract during his life, the real estate in Equity would have descended upon the heir; and there was a clear right in the party to leave the estate to descend, as he thought proper.

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It is true, there are many passages in the report of that case, going much farther, and a considerable length to establish this; that the case of a devisee is to be distinguished from that of an heir; and that in the case of a devisee it is to be understood, that, the vendee having the estate at the time of the devise in the sense, in which he has it in Equity, though it fails, because ultimately he cannot have it, yet such a devise is to be understood as a direction, not only that the devisee shall take, but that, if he cannot, the executors shall purchase another estate for that devisee. This doctrine is very important, and somewhat new: but, when Lord *Alvanley* is represented to state it to that length, it becomes me to doubt, whether the inclination I feel to the contrary opinion is well founded. If the doctrine is, as it appears stated, all this follows; that, if the testator, instead of this codicil, had simply republished the Will, which

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which would speak from that time, then in the construction of this Court the devise of all his freehold, copyhold, and leasehold, estates, would go to this extent; that it would be a devise, not only of all the legal estates he had at the date of the Will, and of the equitable estate under the contract in these very lands, but that those words must have been construed exactly * as if he had said, he gave all his freehold, copyhold, and leasehold, estates; meaning those, of which he was then seised in Law, and this estate, of which he conceived himself seised in Equity; and also, if he should be mistaken in that, if that equitable estate cannot be conveyed, meaning, under those general words, that his executors should out of his personal estate buy some other estate for the benefit of those, to whom he had given his freehold estate. That is a very strong proposition.

It is said, that proposition is made out by *Coventry v. Carey*. The facts are very fairly stated in *Atkyns*. Lord *Hardwicke* has not entered in his note-book the principle of his decree; but only, that he decreed for the Plaintiff. But in Mr. *Joddrell's* note the judgment is probably better given than in *Atkyns* (24).

Election upon a Will, disposing of the estate of another, and giving an estate to him; upon an implied condition, that he shall permit the Will to take effect.

The cases of Election, referred to in that case, *Noys v. Mordaunt* (25), and *Streatfield v. Streatfield* (26), prove nothing more than this familiar doctrine; that if
 I give

(24) The *Lord Chancellor* here read the note of the arguments in that case from Lord *Hardwicke's* note-book, and of the judgment from Mr. *Joddrell's* note.

(25) 2 *Vern.* 581.

(26) *For.* 176. For other references upon the doctrine of Election see the note, ante, Vol. IX, 533. *Blunt v. Clitherow*, ante, 589, and the notes, Vol. I, 523, 7.

I give an estate belonging to *A*, which I have no power to give without his concurrence, and give any estate to *A*, it shall be understood to be given upon condition, that he shall permit my Will to take effect as to the other. If, therefore, *Coventry v. Carey* contained a case of election, the application of those cases is correct: but, whether they were correctly applied, depends altogether upon this; whether the testator had expressed his intention in such a manner as to raise a case of election; for, if he had called upon the person, who was his heir at his death, to convey any thing, that belonged to that heir in that character, he could call upon him to convey nothing but that, which was the testator's; and therefore, if there was any expression in that Will, affecting property in the hands of the heir, which was the testator's, it would pass by the intention declared, not by election. So, if this codicil calls upon the residuary legatees of the personal estate to give up something, that without their concurrence he could not give to the devisees of the freehold estate, their own property, and they withheld it, this Court would compensate out of that personal estate, so given, the devisees. But the question here, and in *Whittaker v. Whittaker* (27), is, what room there was for the application of that doctrine; for the only question is as to the intention by the codicil to say, he gives to the devisee of the freehold estate by the Will the estate purchased under the contract, if it should become his, or to say, what he might without raising a case of election, being only the expression of his own intention, as to the manner of disposing of his own personal property, which he had full power to dispose of, that he not only gave the estate, if it was his, but, if it should turn out not to be his, desires the residuary legatees to lay out such a sum of money

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money in the purchase of any other freehold estate the devisee should choose to take. If in *Coventry v. Carey* it was determined, that the intention was to give the manor of *Twigmore* to those, who would have taken the other estate, the purpose of an exchange being perfectly clear, if upon the whole Will, attending to the circumstance, that it was a provision for children, that intention appeared, to give *Twigmore* as a consideration for the purchase of a real estate, even named, but, where *nothing was said about title, that case was rightly decided. But that is not the case of a person, devising, as here: viz. an individual at the moment of devising having a specific real estate to dispose of; having by his Will given all his real estate in one course, and his personal estate, to be laid out in land, in a different course; and having between his Will and Codicil entered into this contract for the purchase of an estate, and agreed to have it, if a good title could be made; and the question arising as to his intention by the codicil, referring to the contract, directing execution, &c. if a good title could be made; and if it cannot, the question is, whether in that event, as well as the other, the personal bounty to the residuary legatees should be cut down to the amount of the purchase-money. If not, it is impossible to sustain the claim of the devisees. Where there is a general direction to lay out money in land, the testator takes it for granted, land can be procured. If a particular estate is pointed out, he conceives a title can be made. Upon the point, whether that failing, it may be laid out in other lands, after a difference of opinion between Lord *Thurlow* and Lord *Rosslyn*, it is established, that it may; that the particular estate pointed out, is only the mode directed for executing the primary intention for a purchase.

Bequest, to be laid out in land, pointing to a particular estate: if that fails, it may be laid out in other land: the particular direction being only the mode of executing the primary intention, for a purchase.

The

The doctrine therefore is only this; that he directs what he believes capable of being done in all events, though not in the precise mode; and the Court follows that up; holding, that being directed to be done, it shall be considered as done. But it is quite a different point, whether, if I have a contract for a particular estate, and direct, if it becomes mine, it shall go in a certain course, if it never becomes mine, yet money, to be laid out in another estate, is to go in that direction. Suppose, I have an estate, and wish to buy a small estate in the neighbourhood with a house; and contract for that estate; meaning it for my eldest son; and supposing, no title can be made; it may be the most distant thing from my purpose to take away that value from my other children for the eldest son, if that particular object cannot be obtained. Upon what ground is it to be inferred, that, if I cannot succeed in that object, I also mean any other estate to be purchased; not, which I had an inclination to buy, but, which my heir at law may, contrary to my intended disposition between him and the rest of my family, choose. The situation of the parties also is altered; for the vendor might be a debtor by specialty in respect of the contract. Instead of that, the codicil only directing execution of the contract, the testator being under circumstances, upon which he might withdraw from the contract, as it could not be executed, yet after his death, to make good the question between the heir or devisee and the personal representative, a construction is made, changing the vendor's situation, as a debtor by specialty; and considering the testator as out of mere bounty acquiring another estate; which he never thought of; and would not have so devised. His object might have been to buy that estate, as contiguous; or for other reasons, which might demonstrate his purpose to have that estate only. It is very difficult to maintain the doctrine in

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*Whittaker v. Whittaker* (28); which went beyond what was necessary for the decision.

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My opinion, therefore, as this is a new case, and not falling in with that doctrine, or some of the passages I have now referred to, is given with great doubt and deference; and therefore if you are dissatisfied, you may have it argued again. But, I think, it is carrying the doctrine upon equities, supposed to be founded in the intention, much farther than a legitimate construction of this codicil authorizes, to say, if this estate cannot be bought, it amounts to a direction to buy some other estate.

Upon the second question, my opinion is the same as I expressed before; that, if I am right in placing the devisee in the situation of the heir, he cannot say, he will take an estate the ancestor would not be obliged to take; and, if the objection amounts to more than that, which would enable the vendor to say, the vendee shall take compensation, if it goes farther, to entitle the vendee to refuse, that must decide the condition as to this point between his real and personal representatives immediately after his death. Therefore, if no title can be made, the devisees are not entitled to take this estate without a good title, or to have another estate bought for them.

April 8th.

The cause was re-argued on the part of the Plaintiff. The Counsel for the Defendant declined speaking to it again.

*The*

*The Lord* CHANCELLOR.

This case is new *in specie*, of great importance and difficulty. Therefore, I wished it to be spoken to again. I cannot get over this difficulty. If a contract is entered into, for the purchase of an estate, under hand and seal, that estate by force of the contract becomes the estate of the purchaser; and will go to his heir; who will take it free from all debts by simple-contract. The vendor is a creditor by specialty; and, if the whole personal estate would be just sufficient to \* pay for the estate, which was the substance of the contract, the heir would take the estate; and the creditors by simple contract would be disappointed; for there would be a contract by covenant under hand and seal; with which the executor could be charged at law. But, how would it be, if the proposed vendor could not maintain an action; the title being defective? If he could not recover the money at law, will this Court hold, that, as such contract was entered into, and the benefit of it devised, that shall be considered a devise, not only of the land, so contracted for, but a devise of any land, that can be purchased with that money; and, if so, will the Court give that effect to the contract and the Will, that will prejudice simple-contract creditors? If that is not the effect as to simple-contract creditors, upon what principle can it be said, that this is the doctrine, if there are simple-contract creditors, and not, if there are no such creditors? In the cases cited there was no doubt, if the title had been good, the estate would have descended upon the heir against simple-contract creditors: but it was held, that, if the title was not good, the heir could not insist upon any thing; and the consequence is, that, the title being bad, the simple contract creditors might have been paid out of the purchase-money, that in the case of a good title would have been laid out in land.

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It is very difficult to say, there is a difference between the heir and devisee, where the title of simple contract creditors comes in question; and, if not, the case must be pursued to the consequence: viz. that this is the doctrine of the Court, if there are simple contract creditors; and is not the doctrine, if there are none. I cannot alter the opinion I have expressed.

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*April 2d, 8th.*WARREN, *Ex parte.*

Where no one could be procured to act as Committee of a Lunatic, a Receiver was appointed, with a salary; but to be considered, and give security, as Committee.

UPON this petition in lunacy it was stated, that no one could be procured to act as Committee, and it was proposed, that a Receiver should be appointed, with a salary.

The *Attorney-General* objected, that the personal property would not be secure; observing upon the different nature of the securities given by the Receiver, and by a Committee; that, though property in the funds could be brought into Court, other personal property could not; and that, if in these cases a Receiver is appointed, with a salary, it will be difficult to procure Committees.

The Lord CHANCELLOR, expressing reluctance to do this, on account of the different nature of the security, it was said by Mr. *Richards*, in support of the petition, that the property consisted only of real estate and trust funds, vested in trustees; the rents and interest of which might be received without vesting the funds in the Receiver; to which the person proposed had some particular

cular objection. It was therefore proposed, that the person to be appointed Receiver, should have a salary, but should be considered as Committee; and give security as such.

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WARREN,  
*Ex parte.*

*The Lord CHANCELLOR* said, if he gave such security, as is satisfactory to the *Attorney-General*, as a Committee does, it was not material whether he is called Committee or Receiver; and made the Order accordingly (29).

(29) *Ex parte Radcliffe*, 1 Jac. & Walk. 639.

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